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No. 622

In the Supreme Court of the United States

October Term, 1941

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

A. H. BELO CORPORATION, RESPONDENT

BRIEF FOR RESPONDENT

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v.

A. H. BELO CORPORATION, RESPONDENT.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the district court (R. 185-189) is reported in 36 F. Supp. 907. The opinion and concurring opinion in the circuit court of appeals (R. 485-496) are reported in 121 F. (2d) 207.

JURISDICTION

The judgment of the circuit court of appeals was entered on June 27, 1941 (R. 497). The petition for writ of certiorari was filed on September 16, 1941, and granted on October 27, 1941 (R. 498). The jurisdiction of this court was invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

I.

Petitioner's Statement of Question Presented	Respondent's Revision of Petitioner's Statement

(Matter appearing in one column but not in the other printed in heavier faced type.)

Prior to the enactment of the Fair Labor Standards Act the respondent paid its employees fixed weekly salaries.	Prior to the enactment of the Fair Labor Standards Act the respondent paid its employees fixed weekly salaries. **The necessities of respondent's business were such that (with rare exceptions) all employees here involved worked fluctuating hours requiring overtime service every week.**
In anticipation of the Act, it made	In anticipation of the Act, it made
so-called[1] agreements with each of its employees	agreements with each of its employees **which, on undisputed evidence, both the District Court and the Circuit Court of Appeals have factually found are genuine and real, deliberately entered into and continuously carried out in good faith by both employer and employee,**[2]
setting forth an hourly "basic rate of pay"	setting forth an hourly "basic rate of pay" **for the first forty-four hours of work**

[1] Contrast the characterization here used, "so-called," with the admissions expressed and implied in petitioner's brief (pp. 38, 12) that the agreements are "bona fide," free of "fraud or duress," free of "dishonest intent" and are "a legally binding contract with its employees."

[2] See Findings (R. 488, 494-495, 496) that the contracts were "actual," "bona fide," "real," not "fictitious," not "pretense," and "actual deliberate contracts intelligently made, and not mere bookkeeping or a scheme to evade."

(generally equal to one-sixtieth of the weekly salary),	(generally equal to one-sixtieth of the weekly salary, **but with appropriate variation of the fraction in individual cases in consequence of particular conditions)**
(Note that petitioner's statement wholly omits any reference to the overtime provisions of the agreements)	**and as to overtime,**
	providing for the payment for each hour thereafter of compensation at a rate not less than one and one-half times such basic rate,
together with a guaranty that **in any event the compensation would not be less than the prior weekly salary.**	together with a guaranty that **his total compensation "for regular time and for such overtime as the necessities of the business may demand" should be not less than a stated figure which was equal to or greater than that which he theretofore had received each week.**
THE QUESTION IS WHETHER,	THE QUESTION IS WHETHER,
in computing overtime compensation (at time and one-half),	in computing overtime compensation (at time and one-half)
the **arbitrary**[3] hourly rate specified	the hourly rate **thus** specified
in each employee's agreement	in each employee's agreement **for the first forty-four hours of work**
is the "regular rate at which he is employed" under Section 7 of the Act.	is the "regular rate at which he is employed" under Section 7 of the Act,

[3] **The word "arbitrary" is brought to the front by petitioner for the first time in his brief in this court. In the District Court and brief in Circuit Court of Appeals he used the characterizing words "fictitious," "pretense," "device" and "subterfuge," to which the findings referred to in note 2, supra, are responsive.**

OR WHETHER

the stipulated allocation to the first forty-four hours of work of a definite hourly wage and the stipulated allocation to overtime hours of the higher and all additional compensation included in the guaranty must be disregarded by this court

and

the factual determinations by District Court and Circuit Court of Appeals aforesaid must be likewise disregarded by this court

and

the whole of the guaranteed weekly total compensation for the first forty-four hours and for overtime must be deemed by this court as if distributed at a uniform hourly rate for all hours worked

and

the "regular rate of pay" thereupon must be declared by this court to be the quotient obtained by dividing the total number of hours worked each week into the total of the guaranteed total weekly compensation[4]

with result that

an increased "regular rate" of pay will be deduced as a basis in turn for deducing an increased overtime rate of pay, and as a basis in turn for de-

[4] This is the only method of computation mentioned in petitioner's brief as a demanded substitute for the contract rates of pay. But Interpretative Bulletin No. 4 stipulates a different method of computation to be applied when the hours from week to week are more or less uniform (the exact degree of uniformity not specified), in which case the divisor is the uniform hours, even in weeks of variation from the uniform, instead of the total number of hours worked. Petitioner's expert computator applied such different method to some employees in this case, in his testimony in the trial court (R. 167-169).

claring the employer in default in his payments to employees for both regular time and overtime

and practical results: pre-determination of rates of pay or of total compensation becomes impossible; uniformity of pay from week to week becomes impossible; both regular and overtime rates become smaller as the hours worked become longer; the overtime rate instead of "not less than" one and one-half becomes exactly one and one-half; employment arrangements preferred by employees and employer-employee amicability based thereon become disrupted; certainty of what is to be paid and received becomes uncertainty, depending on fluctuating application of petitioner's Interpretative Bulletin, and decision of court and jury, and such uncertainty becomes a cumulatively mounting dollar threat, jeopardizing the solvency and existence of the employer.[5]

II.

Whether the overtime provisions of the Act, if applied in the circumstances of this case to require wage payments in excess of the amounts contracted for, are

[5]The argument advanced to induce and compel this Court so to disregard the contract and the factual findings of District Court and Circuit Court of Appeals is that the Wage and Hour Administrator has issued "Interpretative Bulletins" claimed by him to set forth the aforesaid as his interpretation of "regular rate" of pay as used in the Act, notwithstanding admittedly Congress has granted him no authority to issue any regulation defining "regular rate" of pay, and his claimed interpretation is designed purposely to achieve the objective of shortening hours or increasing pay even though the wage standards are in excess of those prescribed by the Act, with ultimate goal of curtailing hours of work, although such goal is not declared or specified in the Act as an objective.

within the power of Congress under the Commerce Clause of the Constitution of the United States and not violative of the due process provision of the Fifth Amendment. Whether petitioner's construction of the Act would not encounter serious constitutional obstacles.

III.

Whether respondent's newspaper employees are "engaged in commerce or in the production of goods for commerce" within the meaning of Section 7 of the Act.

IV.

Whether respondent's employees are "engaged in" a "service establishment the greater part of whose * * * servicing is in intrastate commerce" within the meaning of the exemption contained in Section 13(a) of the Act.

STATUTES INVOLVED

The relevant provisions of the Fair Labor Standards Act (52 Stat. 1060, 29 U. S. C. §201 et seq.) are set forth in the Appendix volume.

STATEMENT OF THE CASE

Petitioner's statement of the case omits so much of importance to the full understanding of the case that it becomes necessary to submit a substitute statement as follows:

Respondent is publisher of the Dallas Morning News, daily and Sunday, and Texas State Almanac and Industrial Guide, at irregular intervals usually every other year, and owner and operator of radio station WFAA and half owner of radio station KGKO. Since respondent's interest in KGKO is merely a stock

interest, KGKO employees are not involved in this suit. Prior to December 31, 1940, respondent was publisher of a semi-weekly farm paper known as Semi-Weekly Farm News, but such publication was discontinued on December 31, 1940 (R. 28).

Respondent employs 461 employees in its publishing activities and 51 in its radio activities, exclusive of officers and department managers. Of the newspaper employees 130 are employed in mechanical departments and are covered by collective bargaining contracts with the typographical, stereotyper's and pressmen's unions. Such employees are not involved in the questions here presented. Unless otherwise noted, this brief relates to the other newspaper employees and the radio employees, 382 in number (R. 77, 149-153, 441).

Such employees work on a continuing employment basis. Their number does not include any casual or part-time or temporary employee. Thus, of the total number of employees, including those in the mechanical departments, 100 have been continuously employed by respondent over twenty years, 70 from fifteen to twenty years, 85 from ten to fifteen years, 118 from five to ten years, and 86 from three to five years, leaving only 53 whose employment has continued for less than three years (R. 95).

Necessarily, in a business serving the public, regularly for seven days a week and for longer hours each day than the usual, and irregularly for still longer hours, such as radio and newspaper, the employees work fluctuating hours involving overtime service. The only exceptions to the rule of fluctuating hours are the few employees who can work in regular shifts, such

as night watchmen, PBX operators and janitors, and some women employees as to whom special arrangement was made to provide regularity of hours (R. 496, 63-64, 194-337).

Prior to October 24, 1938, the effective date of the Act, respondent and its employees had worked out a satisfactory set of employee arrangements, developed through the years in the light of the continuing nature of the employment and the necessity of fluctuating hours, as follows:

(1) Employees received a uniform weekly salary—a guaranteed amount 52 weeks a year which they could count on, in slack periods as well as busy periods, in sickness as in health, in old age as in prime (R. 31, 38, 41, 82-83, 86); save for a few office boys and colored janitors all salaries when translated into hourly rates of pay were and long had been above the minimum prescribed by the Act (R. 38, 187, 339);

(2) Employees received regular vacations of approximately two weeks a year, at full pay (R. 78, 98-99, 140, 442-456);

(3) Employees received special bonuses at year end as a special reward for faithfulness, amounting, in recent years, to approximately one week's earnings (R. 82, 98-99, 442-456);[6]

(4) Employees received full pay during periods

[6] Petitioner selected 48 employees from the entire payroll for sample evidence presentation purposes. As to such employees petitioner chose one week in each month after October 24, 1938, sometimes more, sometimes less, for noting of hours worked and wages received on wage computation sheets at R. 194-337. As to 46 of these same employees (2 being inadvertently omitted) and for the same period of time, respondent produced evidence at R. 442-456 of other weeks of vacations, bonuses and illness with pay. For the 46 employees the aggregate number of working days taken off with full pay from October 24, 1938, to December 31, 1940, was 1,792.

of illness, sometimes continuing week after week, and month after month, and of absence from work on personal matters (R. 78-79, 98-99, 442-456);

(5) When employees grew old or incapacitated to do a full schedule of work, they were nevertheless retained in employment at full rates of pay; at the time of trial 28 superannuated employees were being carried on the payroll at full rates; $64,360.00 was paid to them during 1940 (R. 79, 80);

(6) Employees were permitted rest periods and absences for personal affairs without other restriction than their own sense of duty and without keeping time and without deduction from pay (R. 64, 83, 93, 98-99, 442-456);

(7) Whenever an employee was required to work unusually long hours in any week he was given compensating time off in the next week or as soon thereafter as possible; such time off arrangement was continued after the Act went into effect and after overtime compensation was paid for the long week (R. 90-93);

(8) Life insurance was carried for employees at respondent's expense (R. 60, 180);

(9) The employees, in turn, were loyal and devoted, comprising what was known both in the language of employees and the management as "the News family" (R. 33-34, 38, 41, 83-84, 459-461, 86, 93-94, 180, 181-184).

The result of such employee arrangements was satisfaction on the part of employees as well as good wages and steady wages.

When it became known that the Act would go into effect October 24, 1938, respondent determined to

bring its employee arrangements into harmony with the Act. At the same time it was desired to preserve the advantages of the existing employee arrangements as nearly as may be. Indeed, the employees were urging respondent to make no change (R. 83). Respondent sought legal advice to ascertain how all requirements of the Act could be satisfied without unsettling the amicability that existed. And all that respondent did thereafter was done with the advice and approval of its attorneys (R. 37-39, 46, 85-87).

Respondent was advised by its attorneys that it was necessary to install a system for keeping full records of hours and wages, and to raise the few lowest paid employees to at least the legal minimum, and to convert the salary system into an hourly wage system, so that it would be possible to know at all times that payment for overtime was at a rate of at least one and one-half times the payment for regular time; that the Act seemed to contemplate a fixation of pay for regular hours but a permitted variation of pay for overtime hours ("not less than"), and hence it seemed unnecessary to discard the system of uniform weekly pay and of full pay for vacations, illness, time off and superannuated employees; and that no reason appeared why a uniform compensation could not be guaranteed each week as a minimum if the added compensation contained in such minimum beyond the compensation produced by multiplying the hourly rate by

the number of regular hours[1] be allocated to overtime hours, and if added overtime compensation beyond the amount included in the guaranteed minimum be paid when the number of overtime hours were such as to require still added payment (R. 37-39, 46, 85-87).

Accordingly, respondent arranged separately with each of its employees for an hourly rate of pay for regular time. The amount of such hourly rate varied as to each employee, depending, in the main, on the past salary paid to the employee. Direct relationship to the past salary of the employee was achieved in most instances by dividing 60 into the past weekly salary, but with variation of the fraction in individual cases in consequence of particular conditions, as a short-cut method of arriving at an appropriate hourly

[1] Throughout this brief respondent uses "regular hours" or "regular time" or "regular time hours" to indicate the first forty-four hours during the first year of the Act, forty-two hours during the second year of the Act and forty hours thereafter, as opposed to the overtime hours. Similarly respondent uses "regular pay" or "regular rate of pay" to indicate the pay or rate of pay for the regular hours, as opposed to the pay or rate of pay for the overtime hours. Petitioner sometimes uses the same expressions to indicate the same meanings. But, more often, petitioner uses "straight-time" or "straight-time hours" as the equivalent of "regular time" or "regular time hours." Likewise petitioner frequently uses "straight-time pay" or "straight-time rate" to indicate the pay or rate of pay for the regular hours as opposed to the pay or rate of pay for overtime hours. Respondent has avoided the use of the word "straight-time" because it is not a word which possesses any dictionary meaning and is susceptible of misuse to indicate pay or rate of pay derived by distributing total pay at a uniform hourly rate for all hours worked through the process of dividing the total number of hours worked into the total compensation. Indeed, petitioner sometimes uses "straight-time pay" to mean the pay or rate of pay derived by such computation. It is important to avoid the confusion which might result from sometimes using "straight-time pay" to mean the pay for the first forty hours and sometimes using the same expression to mean the quotient obtained by dividing the total number of hours worked into the total compensation. Respondent's usage of the mentioned words conforms to the dictionary definitions. See Webster's New International Dictionary, 1933 Edition: "Overtime, adv. After the proper or regular time or limit"; Century Dictionary, 1934: "Overtime, n. Time during which one works beyond the regular hours." Such usage also conforms with the usage adopted by the Act.

rate for regular time for agreement between employer and employee. Thus all the same elements which went into the fixing of the past salary, including the skill of the employee, his efficiency, his faithfulness, his value to the business, his experience, his length of service, and the number of hours to be worked, and, on the other side of the ledger, the year-end bonuses, the paid vacations, the time off for illness, the policy of employer with respect to superannuated employees, and the permanency of the employment, went into the fixing of the regular hourly rate (R. 87-89).

The regular hourly rate of pay so agreed upon between employer and employee, together with the agreement to pay not less than one and one-half times such rate for all overtime hours, and the agreement for minimum weekly guaranteed amount, were embodied in letter agreements signed by employer and by every employee. The initial contracts were dated October 22, 1938, and are of typical form as follows (R. 467-468):

October 22, 1938.

JAMES S. ALDERMAN
Station WFAA
Dallas, Texas

Dear Sir:

The Fair Labor Standards Act which goes into effect on October 24, 1938, provided for the following minimum wages and maximum hours of employment:

First year—25¢ per hour minimum
44 hour maximum per week

Second year—30¢ per hour minimum
42 hours maximum per week

Third year—40¢ per hour minimum
40 hours maximum per week

except that employees may work more than the number of hours specified above, provided that overtime rates shall be a minimum of one and one-half times the basic rate.

In order to conform our employment arrangements to the scheme of the Act without reducing the amount of money which you receive each week, we advise that from and after October 24, 1938, your basic[8] rate of pay will be 67 cents per hour for the first forty-four hours each week, and that for time over forty-four hours each week you will receive for each hour of work not less than one and one-half time such basic rate above mentioned, with a guaranty on our part that you shall receive weekly, for regular time and for such overtime as the necessities of the business may demand, a sum not less than $40.00.

Very truly yours,

G. B. DEALEY,
President.

MR. G. B. DEALEY:

This will acknowledge receipt of your letter of October 22nd concerning wages and hours effective October 24, 1938.

(signed) JAMES S. ALDERMAN."[9]

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[8] Petitioner at the trial and in smaller measure in his brief attempts to make point of the use of the expression "basic" rate of pay in the letter agreements in lieu of "regular" rate of pay. But it is quickly apparent from the letter contract as a whole and particularly from the description of the Act as requiring that overtime rate shall be a minimum of one and one-half times the basic rate, that the term "basic rate" was used as synonymous with "regular rate."

[9] Although petitioner does not challenge the genuineness of such employment letters as constituting true agreements between employer and employee, affirmative proof was made that the letters were signed by all employees voluntarily and in good faith and without persuasion or coercion of any kind (R. 87, 182, 183-184, 388). Petitioner's brief (Note

Such a letter was signed by each employee prior to October 24, 1938 (R. 54). Subsequently as any change took place in rates of pay, either as to hourly rate or minimum guaranteed amount, new employment letters were signed to conform to the changes. The form of letter agreement used in such instances, and as to all employees who began employment after October 24, 1938, was changed to correct the misstatement of "40¢ per hour minimum" in the third year of the Act but was substantially unchanged (R. 470-471, 50-53).

As to the particular 48 employees selected by petitioner for sample evidence purposes, the regular hourly rates of pay and minimum guaranteed weekly amounts, at the outset, and as increased from time to time by execution of new employment agreements, are shown at R. 469-470, 472-473. As to the employees as a whole the regular hourly rates of pay and minimum guaranteed amounts in effect at the time of trial are shown at R. 441. Such schedule shows 74 employees at 30¢ per hour regular rate, 56 at rates of between 31¢ and 40¢ per hour, 61 at rates of between 41¢ and 50¢ per hour, 44 at rates of between 51¢ and 60¢ per hour, 40 at rates of between 61¢ and 70¢ per hour, 44

8, p. 7) points out that in some instances raises were given in advance of preparing and executing new written agreements evidencing the new rates. But no claim is made that any employee failed to understand the written agreements or any oral arrangements for a raise which may have preceded the written agreements. And it is not contested that all such agreements, both oral and written, were entered into with intent on the part of employer to pay compensation at the rates there specified and intent on the part of employee to accept compensation at such rates, and compensation was so paid and so accepted, without complaint or misunderstanding from anyone for nearly twenty-eight months before the trial of this case. And at the trial all employees filed answer in the declaratory judgment suit hereinafter mentioned expressing their preference in favor of the employment agreements and asking that they be sustained.

at rates of between 71¢ and 80¢ per hour, 21 at rates of between 81¢ and 90¢ per hour, 18 at rates of between 91¢ and $1.00 per hour, and 154 at rates of over $1.01 per hour.[10]

Thus, the employment contracts bound the employer to pay at least one and one-half times the specified regular rate for all overtime hours, with a minimum guaranty of a specified amount weekly to cover overtime hours as well as regular hours.

In substance, the minimum guaranteed sum was allocated by the terms of the employment contract so much to regular time at the specified regular hourly rate and the balance to overtime, with the provision that if the amount so allocable to overtime was insufficient to constitute payment for all overtime hours at a rate not less than one and one-half times the regular hourly rate, then additional compensation would be paid so that the employee would receive payment for each overtime hour at the rate of at least one and one-half times the regular hourly rate.

Of course, in instances where the regular hourly rate was exactly 1/60 of the minimum guaranteed amount, the minimum guaranteed amount was sufficient to cover both regular time work and overtime work up to a total of 54½ hours during the first year of the Act (when overtime began after 44 hours), and 54 hours during the second year of the Act (when

[10] See Joint Hearings before the Senate and House Committees on the Fair Labor Standards Act, Part 1, p. 244: "In a recent statement from the Department of Labor the highest paid industries were listed as follows: Newspapers, 94.2 cents per hour; rubber tires 93 cents per hour . . . ."

overtime began after 42 hours), and 53.3 hours since October 24, 1940 (when overtime began after 40 hours). For all hours worked above such number in any week additional compensation was due under the employment agreements, and was paid.[11]

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[11] Petitioner arbitrarily assumes in his brief that the minimum guaranteed amount is for regular time alone and does not cover any extra compensation for overtime pay. Such assumption is contrary to the language of the employment contracts, the understanding of all the parties to the contracts and the practice of employer and employees in applying the contracts. The only reasons offered by petitioner for his assumed interpretation of the contracts are found in note 45, p. 36, of the brief, where it is said that the contracts result in "fantastic" variations in overtime pay, that overtime would be paid in weeks under forty hours "for working no overtime at all" and that respondent at the trial characterized the variable overtime pay as a "bonus." In fact, the only reference to "bonus" came from petitioner's Regional Director Street, as examination of the cited pages of the Record (15, 31, 87) will show. As for the other reasons, petitioner overlooks the fact that the weeks of no overtime hours are rare; that such weeks are sandwiched in between many other weeks of overtime hours, that the employment as a whole was based upon a continuing number of weeks, most of them containing overtime hours, that the minimum guaranteed sum represented the idea of employer and employee of a composite week made up of all such continuing weeks, that the employee received the minimum guaranteed sum in short weeks only because he was to work longer weeks before and after, and that, in reality, the minimum guaranteed amount covered a continuing course of overtime employment, in addition to the continuous course of regular time employment. There is no dispute in the record as to the true intent and agreement of employer and employee on this point. See R. 132-134. Indeed, the weeks of no overtime hours were attributable in almost every instance to absence by reason of vacation, illness, time off for personal affairs or compensating time off allowed for loss of usual rest periods in prior weeks of unusually long hours. Thus, as to Anderson, the Record shows six weeks of no overtime hours. The first, ending 12/26/38, was the week of Christmas holiday. The second, ending 5/29/39, was a week of regular vacation. The next, ending 2/26/40, was a week of illness. The next, ending 9/2/40, was the week of Labor Day holiday. And the last, ending 10/21/40, was the week of the State Fair of Texas, held in Dallas, for which all Dallas employees are allowed a holiday. (R. 194-197, 454). What substance, then, in any claim based upon "fantastic" operation of the employment contracts in weeks of no overtime hours? Are the contracts to be overridden because respondent chose to continue full pay in weeks of illness or holiday? Indeed, upon analysis, it will be seen that the choice of respondent to continue full pay during such weeks really amounts to a special contract made for such weeks. The employer really responded to an express or implied request of the employee to continue pay during such weeks. Thus the situation in such special weeks is not to be taken as vitiating the agreement and situation which exist in the weeks when overtime service is required. Upon further analysis, it will be seen that the special grant of pay in the weeks of illness and vacation, etc., is really added compensation for the overtime service in other weeks. When compensating time off was given in a particular week to make

For instance, Olin S. Brown is a control operator at WFAA and necessarily works fluctuating hours (R. 125-126). His rate of pay was fixed by agreement on October 22, 1938, at 71¢ per hour regular rate, with minimum guaranteed amount of $42.50 (R. 469). Such rate of pay was later increased to 75¢ per hour regular rate with $45.00 minimum guarantee, and was increased again in January, 1941, so that at the time of trial it stood at 84¢ per hour, with minimum guaranteed amount of $50.00 per week (R. 126, 472). During the week ended April 24, 1939, he worked 66 hours and received $57.94 (R. 130-134).

Robert Mountique, a paper handler, was employed by contract specifying 30¢ per hour as regular rate and $15.60 weekly minimum guarantee, effective October 24, 1940 (R. 473). During the week ended December 2, 1940, he worked 54 hours and received $18.30, which was $12.00 for the 40 hours of regular time and $6.30 for the 14 hours of overtime, to wit, 45¢ an hour for the overtime (R. 102, 276).

J. L. Brewer, a bookkeeper, was entitled by contract of October 22, 1938, to 34¢ per hour regular rate and $20.00 weekly minimum guarantee (R. 469), subsequently twice raised (R. 472). During the week of January 9, 1939, he worked 63 hours and received $32.50, which included $14.96 for the 44 hours of

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up for unduly long hours in prior weeks the transaction was in form as well as substance, and expressly as well as by implication, added compensation for the overtime service. Moreover, no complaint of law violation is made as to any week of no overtime hours. Petitioner's complaint relates wholly to weeks when overtime hours were worked. In all such weeks the contract was, and could be, applied exactly as it reads, and as the parties understood and agreed.

regular time and $17.54 for the 19 hours of overtime, such overtime pay being at the rate of more than one and one-half times the specified regular rate, and including $2.50 paid extra because the work included a special Sunday morning job of checking classified advertising (R. 102-103, 209).

Similarly, J. L. Wicker, a plant engineer at WFAA, received 71¢ per hour regular rate with minimum weekly guarantee of $42.50 (R. 470), subsequently raised (R. 473). During the week of March 13, 1939, he worked 59 hours and received $47.29, which was $31.24 for the 44 hours of regular time plus $16.05 for the 15 hours of overtime, to wit, the overtime rate of $1.07 (R. 104-105, 336).[12]

Petitioner's brief (p. 33, note 38) states that in some weeks "no additional compensation was paid even for hours in excess of respondent's maxima."

On the contrary, the witness Donosky testified fully that the practice as well as the express agreement was to pay the requisite added amount when the overtime hours were such that the weekly guaranteed minimum was not sufficient to cover all the overtime hours at one and one-half times the regular rate of pay (R. 89-93), and, further, that he had caused the wage and hour computation sheets offered in evidence by petitioner to be checked for possible instances of variance

[12] Petitioner's brief points out that payments for overtime in excess of the amount for overtime included in the weekly guaranteed amount were not ordinarily made until the following week because the clerical work of making up pay checks necessarily began before the end of the current week. But it is not claimed that the Act requires such added payments to be made at any particular time or that delay of one week is unreasonable. The delay would be no less if petitioner's method of computation were followed.

from such practice, with result that only two such instances had come to light, one instance as to Roosevelt Burleson, a colored paper handler, who got $17.50 in a particular week when he should have received $17.85, and the other instance as to Tom Simmons, in charge of the telegraph desk, when in the week of the Athenia disaster he worked long overtime hours and failed to receive the full amount to which he was entitled under the terms of the employment agreement (R. 97-98, 103-104, 105). It should be noted as to Simmons that it was thought that he was exempt from the Act as occupying a supervisory capacity (R. 98) and that the requirement of keeping time was ceased as to him in 1940 (R. 289-290). A recheck of the wage computation sheets discloses one additional instance that is unexplained, J. E. Lockart, Jr., week of 7/31/39 (R. 250). Nine similar instances which would seem to appear in the wage computation sheet of William C. Ellis (R. 321-323) are not true instances of variance from the regular practice. Ellis performed two separate jobs, one as studio control engineer, for which his regular rate was 75¢ and minimum guaranteed sum was $45.00, and the other, handling electrical transcriptions, for which he was paid separately a flat sum of $10.00 per week (R. 109, 472), and the overtime hours worked by him were attributable in large part to such ancillary job for which he was paid on a flat sum basis.

The record demonstrates that the few instances of failure of compliance with the employment agreements are nominal and arose from inadvertence and do not

tend to indicate an intention or practice of departure from the terms of the employment contracts.

In order to maintain a fair distribution of the work among the employees in each department, each department head was given the authority to fix a maximum number of hours for his department beyond which the employee would receive specially favored treatment in addition to his usual overtime compensation. When employees worked longer than the departmental maximum they would be given time off in some other week, or time off would be accumulated for use in extending the usual vacation period, to compensate for the excess hours. Such method of giving time off was not employed as a substitute for overtime pay. It represented an additional allowance for overtime and was not abandoned after the Act came into effect. For instance, in the city news department the maximum hours without compensating time off was 48 before the Act went into effect. After the Act went into effect such maximum was reduced to 45. If an employee worked 55 hours in any week in such department, he was paid for 40 hours at the regular rate of pay specified in the employment contract plus 15 hours at one and one-half times such regular rate of pay and, in addition, he was given 10 hours time off in the next week or as soon thereafter as possible (R. 64, 90-94).

Petitioner's brief refers to the above arrangement as maintaining a sort of "median figure" of "48 hours for men and 44 hours for women," and then states that such median figure remained the same after the Act as before. Thus the brief contains repeated state-

ments that the result of respondent's wage arrangements was that "no change in working hours or in compensation was made on October 24, 1939," or "on October 24, 1940," that respondent was permitted "to maintain unchanged its working and wage schedule despite the Act," and that the employees after the Act worked "the same hours for the same compensation as before."[13]

While the objective was to maintain the employee relations and wages on a level basis with that which theretofore existed, it was not desired to abandon the policy of making promotions, pay increases, and improvements in working conditions as rapidly as circumstances permitted. The fact is the departmental maximums were reduced from time to time in the city news department, as above noted, and in other departments than the city news department, and in all departments generally as to women employees (R. 63-64, 95-96). Similarly raises in pay took place from time to time both as to hourly rate and minimum guaranteed sum. Thus, of 38 employees listed at R. 469-470,

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[13] Of course, it would seem to be of no legal consequence whether hours and salaries were greater or less after the Act than before or whether any particular employee worked longer or fewer hours after October 24, 1940, than before, or after October 24, 1939, than before, or after October 24, 1938, than before, so long as no employee was paid less than the minimum prescribed by the Act or less than one and one-half times the regular rate of pay for all overtime hours. Indeed, petitioner conceded in his brief in the Circuit Court of Appeals (p. 69) that "The government does not, of course, claim that genuine regular rates of pay may not be fixed by agreement between employer and employee. Neither do we contend that Section 7 freezes wages at the levels prevailing at the effective date of the Act or at any time. Nor do we claim that the Act prevents a genuine reduction in wages," and repeats such admissions at p. 37 of his brief in this court. Nevertheless, petitioner's argument lays such stress on whether salaries and hours were greater or lesser after the Act than before that it seems proper to point out the inaccuracy of petitioner's statement of the facts in this respect.

selected by petitioner for sampling purposes, 34 received raises in pay, many of them twice, between October, 1938, and January, 1941 (R. 472-473). The result was a substantial increase in the total payroll in a typical week in October, 1940, over a typical week in October, 1938 (R. 180-181).

The above described employee arrangements had been in effect over eighteen months with satisfaction and amicability when petitioner made claim that such arrangements were violative of the Act and that respondent owed some large amount, from thirty to sixty thousand dollars, to its employees, for which restitution was demanded, in unpaid regular wage and unpaid overtime wage, calculated as indicated at p. 4, supra, but actually the claim was that all payments should be allotted to the regular hours, leaving a deficit existing only in overtime pay. The claim was that the agreement for a minimum guaranty somehow automatically raised the true regular rate of pay beyond the agreed figure, resulting in a claimed liability to pay still more, plus a still added amount as penalty, by the process referred to at p. 4, supra.

Such claim was persisted in despite the admitted "very fine and generous treatment the News has always given to its employees in the matter of compensation and in the matter of time, and everything" (R. 36), and in opposition to the desires of the employees (R. 27-44).

It was stated to respondent that petitioner was moved into action because a complaint had been re-

ceived from an employee, but the Regional Director would never name or identify the supposed complaining employee and later filed answer in the declaratory judgment suit hereinafter mentioned renouncing any claim to represent any employee. He did not take the witness stand in such suit to affirm or deny the receipt of the supposed complaint (R. 27-45).

For the purpose of obtaining a judicial determination of the questions arising out of such demands, respondent filed a suit with the said Regional Director and certain employees, representatives of the whole class, as defendants, praying for a declaratory judgment on such questions (R. 12-20). The employees filed an answer in such suit, authorized over the signature of every employee, expressing preference in favor of the employment arrangements and asking that they be upheld (R. 181-184).

This suit to enjoin continuance of the employment arrangements was filed in response to the declaratory judgment suit. Both suits were tried together, resulting in a decree in both suits upholding the respondent's wage arrangements. Since the Regional Director was dismissed from the declaratory judgment suit upon his disclaimer of representation of any employee, no appeal was taken in the declaratory judgment suit.

SUMMARY OF ARGUMENT

I.

A. Regular Rate as Applied to This Case

When compensation is paid on the basis of a salary or uniform minimum amount paid periodically to cover overtime hours as well as regular hours, the

problem under Section 7 is to separate what is paid for the regular hours from what is paid for the overtime hours.

The Act lays down no rule for determining such regular time earnings. Nor does the Act confer authority on the Administrator to make rules on the subject. Hence, the problem is left for determination by the courts in the usual way upon appraisal of the evidence.

The ultimate issue of what earnings in a particular case are paid for the regular hours is a question of fact just as much as the related question of what total sum was paid as earnings for the total hours.

In this case such question of fact is now settled by the harmonious findings of the lower courts.

Such ultimate question ordinarily depends upon ascertaining the intent and agreement of the parties who give and receive the payment. Indeed, petitioner concedes (brief, p. 37) that "all rates of pay have their ultimate basis in the agreement of employer and employee."

This then becomes the determining point.

It may be easy or difficult of ascertainment, depending upon the particular circumstances of the case.

The contract of employment may contain no express provision, written or oral, for allocation of pay between regular time and overtime. The contract may provide merely for an all-inclusive salary to cover an indefinite number of hours or a definitely stipulated number of hours, including some overtime hours. The

query then becomes whether an agreement for allocation or separation of pay may be fairly implied from all the circumstances of the case in the light of inferences fairly to be drawn, and, if not, whether the method of computation described in Interpretative Bulletin No. 4 may then be applied as most nearly conforming to the probable understanding of the parties.

Such is the problem of the Missel case, which is to be argued immediately following this case, and of other cases cited in notes 22, 23 and 24, pp. 22 and 23, of petitioner's brief.

No such difficulty exists in the case at bar because here the understanding and agreement of the parties is formally recorded in writing.

The findings of the lower courts and the concessions of petitioner in his brief remove all claims of pretense, artifice, bookkeeping device and duress as applied to the agreements. It is not denied that the rate of pay specified in the contracts for regular time and the overtime compensation specified in the contracts were intended to be paid by the employer and to be received by the employee and were continuously so paid and so received. Admittedly (pet. brief, pp. 12, 38) the contracts of respondent are "a legally binding contract with its employees" and "bona fide" and free of "fraud or duress" or "dishonest intent." Admittedly the contracts were strictly adhered to and continuously approved by the parties, after and notwithstanding the filing of this suit, as well as before.

Hence this case is the easy case. The separation of

pay between regular time pay and overtime pay is made plain by express and valid agreement of the parties. The agreed allocation yields at least the minimum pay for regular hours and at least the prescribed one and one-half ratio of pay for overtime hours. Admittedly, the Act requires no more.

B. Effect of the Contracts

Petitioner's real complaint is that the agreed allocation of pay does not produce greater total pay or shorter hours than before the Act. But he concedes (brief, p. 37) that the parties are free to contract as to wages and rates of pay and even to reduce wages and lengthen hours, so long as the rates of pay agreed upon do not violate the minimum for regular time or the prescribed ratio for overtime. What substance, then, in a contention based upon failure of the contracts to increase wages or reduce hours?

C. Petitioner's Method of Computation

Petitioner's method of computation, as explained at p. 4, supra, offered as a demanded substitute for the contract rates of pay, is wholly unworkable as applied to the facts of this case, in that:

(1) It would become impossible to arrange uniform weekly or monthly compensation for employees working fluctuating hours. All considerations of sound policy are in favor of uniform payments to employees traditionally paid on a salary basis, like the editorial, professional, and white collar employees involved in this case. Petitioner does not contend that disruption of the salary system is to be desired. He only contends that it is an inexorable, though unfortunate, result of the Act. The truth is, it is not the result of any

command of the Act and was never intended by Congress to be a result. Rather, it is the result of petitioner's method of computation.

(2) It is an ex post facto determination, to be made only after the work is done, when predetermination of rates of pay is essential to workable employer-employee relations.

(3) It requires that the employee be classified as "a regular hours" employee or "a fluctuating hours" employee, one method of computation to be followed as to the former and a different method as to the latter. Such classification is to be made in the light of the uniform or non-uniform pattern of the hours in the whole course of the employment, including weeks to be worked in the future long after the employer must pay and the employee must receive what is due. Such classification becomes difficult as to employees who work many weeks of uniform hours and other weeks of non-uniform hours. And it becomes actually impossible, in some instances, to determine, at the time payment is due, whether the pattern of hours will be "regular hours" or "fluctuating hours" and whether the one or the other method of computation is required.

(4) It arbitrarily allocates the whole of the compensation to regular time compensation and arbitrarily refuses to recognize that any part of what is paid is extra compensation for overtime. Such is the necessary result of dividing the salary by the number of hours worked and treating the resulting figure as the "regular rate" of pay. Whether or not such a result may be defended when no part of the salary is ear-marked as added pay for overtime, as in cases cited at pp. 22-23 of petitioner's brief, it is clearly unwarranted when a part of the salary is so ear-marked by agreement of the parties.

(5) It produces fantastic results. For exam-

ple, Olin Brown worked under a contract that specified 75¢ for regular rate, not less than $1.125 for overtime rate and $45.00 for minimum guaranteed sum. During the week ending 4/24/39 he worked 66 hours. For that week he was due $57.94 according to the contract rates and such amount was paid. But petitioner's witness, special auditor Sherrill, applying petitioner's method of computation, testified that Brown's true regular rate for the week in question was 68¢ per hour ($45.00 divided by 66 hours) and true overtime rate was $1.02 per hour, and so yielding $52.36 for total compensation due for the week. Thus Sherrill testified that Brown was actually overpaid $5.58 for the week; that Brown's true regular rate of pay was 68¢ per hour although he was actually paid, and entitled by contract to receive, 75¢ per hour for the regular time hours; and that his true overtime rate was $1.02 per hour, although he was actually paid, and entitled by contract to receive, $1.125 per hour for the overtime hours. Surely there must be something radically wrong with a method of computation which finds that an employee is entitled to receive less than his employment contract agrees to pay him, and less than is actually paid and received. Other equally curious results may be found in Sherill's testimony. To meet this difficulty petitioner presented a new and changed method of computation by reply brief filed after argument in the Circuit Court of Appeals. But such changed method produced equally odd results. Although it is not entirely clear, petitioner seems now to have gone back to the original method.

D. No Policy of the Act Is Frustrated By the Employment Contracts

The legislative history of the Act confirms what is apparent from the Act itself, that the hope or design of spreading employment by curtailing hours of work

was kept within very modest limits, to be achieved only to the extent that employers were unable or unwilling to pay overtime rates.

It was recognized by Congress that spread of employment would take place principally in the lowest paid and unskilled employments, where the labor product in dollar value is so low that the employer cannot afford the added overtime wage. It was known that in the skilled employments, such as here involved, overtime rates would be paid in lieu of curtailing hours. Indeed it was known that in the skilled employments overtime pay, and even the precise formula of time and one-half, had already become a traditional policy.

Hence, the members of Senate and House who had the legislation in charge disclaimed any intent to work revolutionary change, except in the group of lowest paid, exploited workers, victims of sweatshop conditions, known as the submerged one-third, as to whom conditions of employment were shockingly substandard.

As to the many millions of skilled workers, already highly paid, it was considered that the Act merely gave statutory recognition to an overtime tradition which had long existed, and fixed a common starting point, 40 hours, for overtime pay to begin. As to them it was not thought that the problem of compliance was serious or that a disruptive change was being wrought.

Much less was it thought that employment agreements fairly entered into, recognizing the prescribed overtime ratio, accomplishing the desideratum of uni-

form pay, and continuing happy employee relationships of long standing, were being stricken down over the protest of employee and employer alike.

The Act was designed to encourage, not to unsettle, amicable employer-employee relations.

The Act was designed to encourage free bargaining as to hours and rates of pay above the statutory minimums, not to require those already above to pay still more. The Act was designed to give legal sanction to contracts which already assured more than minimum standards and to protect the parties to such contracts from the unfair competition of "chiselers" whose employment arrangements were substandard, not to penalize them by requiring them to do more.

What a distortion of the intent of Congress to use the Act as an instrument to strike down the very more-than-minimum-pay arrangements which Congress purposed to encourage, or to penalize the employer who already had provided more than minimum pay arrangements by increasing his burden.

E. The Claimed Administrative Construction

Interpretative Bulletin No. 4, urged by petitioner as constituting an "administrative construction," is limited, in its terms and effect, to bookkeeping devices and salaries which do not allocate the pay between regular hours and overtime hours. But even if the Bulletin were exactly responsive to the fact situation

in this case it does not represent administrative action of the character which is protected by the rule of "great weight."

II.

If the Act must be construed to require payment of overtime compensation based upon an assumed regular rate of pay above the statutory minimum and above the agreed rate fixed by contract between employer and employee and above an amount that has any relationship to "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers," a serious question would be presented of the power of Congress under the Com nerce clause and of unconstitutional impairment of contract under the due process provision of the Fifth Amendment. The Act should be construed in such wise as to avoid such constitutional objections.

III.

Respondent's newspaper employees are not engaged in interstate commerce or in the production of goods for interstate commerce within the coverage of the Act.

IV.

Respondent is a service establishment, the greater part of whose servicing is in intrastate commerce, within the servicing exemption of the Act.

ARGUMENT

I.

The allocation of pay understood and agreed to by the parties and reflected in the regular time and overtime rates specified in the employment contracts fixes the "regular rate" within the meaning of Section 7(a) and satisfies the requirements of such section.

A.

Regular Rate as Applied to This Case

The applicable language of Section 7(a) is as follows:

> "* * * unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

Petitioner states (brief, p. 11) that "regular rate" means the "actual rate of earnings during straight time," i.e., during regular hours, as opposed to the actual rate of earnings during overtime hours.

Respondent assumes the correctness of such definition and starts from that point.[14] Such was the definition applied by the lower courts in this case.

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[14] Respondent has never urged the interpretation many times put forward, Bumpus v. Continental Baking Co., 124 F. (2d) 549, 551 (C. C. A. 6th, 1941); McLendon v. Bewley Mills, 4 Wage Hour Rept. 30 (N. D. Tex., 1940); St. John v. Brown, 38 F. Supp. 385, 388-9 (N. D. Tex., 1941); Klotz v. Ippolito, 40 F. Supp. 422, 425 (S. D. Tex., 1941); Sunshine Mining Co. v. Carver, 41 F. Supp., 60, 66-7 (D. Idaho, N. D., 1941); Boylan v. Liden Mfg. Co., 4 Wage Hour Rept. 158 (C. C. Mich., 1941); Haddad v. Berkerman Shoe Corp., 4 Wage Hour Rept. 329 (C. C. Pa., 1941), and sometimes sanctioned, Gurtov v. Volk, 11 N. Y. S. (2d) 604 (Munic. Ct. N. Y., 1939); Reeves v. Howard County Refining Co., 33 F. Supp. 90, 91 (N. D. Tex., 1940); Missel v. Overnight Transp. Co., 40 F. Supp. 174, 180 (D. Md., 1941), subsequently reversed in 5 Wage Hour Rept. 25 (C. C. A. 4th, 1942); Keegan v. Ruppert, 4 Wage Hour Rept. 712, 713 (S. D. N. Y., 1941), that "regular rate" means the minimum legal rate specified in Section 6 of the Act, to wit, 25c an hour for the first year, 30c an hour for the next six years and 40c an hour for all time thereafter.

The dispute in this case is on the point what such actual earnings were.

When compensation is paid on an hourly basis, so much for regular time and so much for overtime hours, the determination of the respective rates of pay is automatic.

But when compensation is paid on the basis of a salary or uniform amount paid periodically to cover overtime hours as well as regular time hours, it becomes necessary to separate what is paid for the regular hours from what is paid for the overtime hours.

The Act lays down no rule for drawing the requisite line. Nor does the Act confer authority on the Administrator to make rules on the subject.[15]

Hence the problem is left for determination by the courts in the usual way upon an appraisal of the evidence.

There can be no doubt that the question of what earnings are paid for the regular hours is a question of fact. The initial question of fact is what earnings are paid for the total hours. And the related question of fact is what portion of such total earnings is paid for overtime hours.

The short and fully sufficient answer to the whole contention of petitioner is that such questions have been passed upon with finality as facts by both lower courts[16] upon a full presentation of all the evidence.

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[15] Since the Act does not provide for any action by the Administrator on this subject, the Administrator's interpretations appear not in "Regulations" but in "Interpretative Bulletins," not published in the Federal Register.

[16] The trial court found: "That the regular rate upon which overtime or time and a half has been figured in each instance is the regular wage

Of course, this Court accepts the findings in which two courts concur unless clear error is shown."

Of course, the fact of what pay for regular hours and what pay for overtime hours is to be determined by recourse to the understanding and agreement of the parties who give and receive the pay. Petitioner concedes (brief, p. 37), that "all rates of pay have their ultimate basis in the agreement of employer and employee." This Court has recently so held in the Red Cap cases, Williams v. Jacksonville Terminal Co., 62 S. Ct. 659, 666-667.

Where contracts exist which cover the precise inquiry at hand, the sole remaining question is whether the contracts are free of fraud or duress or overreaching and were entered into with intent that they should be controlling as between the parties.

Here again the mentioned findings of both lower courts are against the petitioner. Also petitioner's own

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that the employee and employer had contracted for, and that such regular wage is in excess of the legal minimum wage" (R. 189).

The Circuit Court of Appeals: The contracts "were intended to, and did, really fix the regular rate at which each employee was employed" (R. 488); the "agreements fixed the regular rate of pay at which each [employee] was employed" (R. 494-495); "the contracts between employer and employee were actual bona fide contracts of employment", were "real contracts of employment", not "fictitious", not "pretense" (R. 488); the agreements "are actual deliberate contracts intelligently made, and not mere bookkeeping or a scheme to evade" (R. 496).

What else can such findings mean if not that the "actual rate of earnings during straight time" accorded with the allocation of pay as agreed by the parties and reflected in the rates specified in the employment contracts?

[17] Tex. & Pac. Ry. v. Louisiana R. R. Comm., 232 U. S. 338, 339 (1914); Brewer Oil Co. v. United States, 260 U. S. 77, 86 (1922); Texas & N. O. R. Co. v. Brotherhood of Ry. Clerks, 281 U. S. 548, 558-560 (1930); Pick Mfg. Co. v. General Motors Co., 299 U. S. 3, 4 (1936); Alabama Power Co. v. Ickes, 302 U. S. 464, 477 (1938); United States v. O'Donnell, 303 U. S. 501, 508 (1938); General Pictures Co. v. Electric Co., 304 U. S. 175, 178 (1938).

concessions in his brief (pp. 12, 38) are against him. It is conceded expressly or by inference that the contracts of respondent are "a legally binding contract with its employees" and "bona fide" and free of "fraud or duress" or "dishonest intent." It is not denied that the rates of pay specified in the contracts were intended to be paid by the employer and to be received by the employee and were continuously so paid and so received. Admittedly, the contracts were continuously approved and adhered to by the parties after and notwithstanding the filing of this suit, as well as before.

In the light of such findings and concessions this case is free of difficulty. The separation of pay between regular pay and overtime pay is made plain by express agreement of the parties. Such agreement is concededly valid and free from charges of overreaching, pretense, or law evasion intent. The agreed allocation yields at least the minimum pay for regular hours and at least the prescribed one and one-half ratio of pay for overtime hours. Concededly the Act requires no more.

The case is to be distinguished from others where an agreement for allocation of pay is not so plain. The contract of employment may contain no express provision, written or oral, for allocation of pay between regular time and overtime. The contract may provide merely for an all-inclusive salary to cover an indefinite number of hours or a definitely stipulated number of hours, including some overtime hours.

In such a case the question is whether an agreement for allocation or separation of pay may be fairly

implied from all the circumstances of the case in the light of all inferences fairly to be drawn.[18]

If no agreement for allocation of pay can be fairly implied, it then becomes necessary to adopt some rule which may be without basis in the understanding or agreement of the parties but which yet may be the best that the court can do. Such may be a proper case for applying the method of computation described in Interpretative Bulletin No. 4.

The cases cited in notes 22 and 23, pages 22 and 23, of petitioner's brief as supporting his method of computation are of the mentioned character. The recognized point of distinction is made clear in the opinions in such cases.[19]

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[18] In cases as follows it was held that such agreement for allocation was fairly to be implied from the circumstances of the case: Reeves v. Howard County Refining Co., 33 F. Supp. 90, 91 (N. D. Tex., 1940); Fleming v. Stone, 41 F. Supp. 1000, 1004, 1006 (N. D. Ill., 1941); Schlee v. Lincoln Oil Co., 5 Wage Hour Rept. 72 (C. C. Mich., 1941).

In other cases as follows it was held that an agreement for allocation could not be fairly implied: Warren-Bradshaw Drilling Co. v. Hall, 124 F. (2d) 42, 44 (C. C. A., 5th, 1941); Bumpus v. Continental Baking Co., 124 F. (2d) 549, 552-553 (C. C. A., 6th, 1941); St. John v. Brown, 38 F. Supp. 385, 389-390 (N. D. Tex., 1941); Muldowney v. Seaberg Elevator Co., 39 F. Supp. 275, 282 (E. D. N. Y., 1941); Klotz v. Ippolito, 40 F. Supp. 422, 425 (S. D. Tex., 1941); Hargrave v. Mid-Continent Petroleum Corp., 42 F. Supp. 908, 909 (E. D. Okla., 1941); Fleming v. Knox, 5 Wage Hour Rept. 38, 40 (S. D. Ga., 1941), Allen v. Moe, 5 Wage Hour Rept. 106 (D. Idaho N. D., 1942); Emerson v. Mary Lincoln Candies, 20 N. Y. S. (2d) 570, 571 (N. Y. Supr. Ct., 1940), affirmed 26 N. Y. S. (2d) 489, affirmed 38 N. E. (2d) 234; DuBois Soap Co. v. Floyd, 38 N. E. (2d) 919, 921 (C. A. Ohio, 1941).

[19] E.g., St. John v. Brown, supra, 38 F. Supp. 385, 388-389: "Plaintiffs insist if, what defendants were paid can be allocated as to cover the statutory minimum for the statutory maximum hours and, in addition, one and a half for all overtime, that such a salary meets the requirements of the law. * * * The proposition seems very plausible, but, unless such was an arrangement agreed to by the parties, my conclusion is, it is not a compliance. * * * It is not enough that the salaries here, independent of the working contract, may be allocated or spread so as to cover the minimum and one and a half for overtime. * * * The key to the right answer is the true per hour wage of the employee. That must be determined, of course, by reference to the actual employment contract." (emphasis ours).

Missel v. Overnight Motor Transportation Co., supra, 5 Wage Hour

The point of distinction is perhaps best expressed in the opinion of the Circuit Court of Appeals for the Fifth Circuit in Warren-Bradshaw Drilling Co. v. Hall, 124 F. (2) 42, decided subsequently to this case. In such case the court (two judges sitting who did not sit in deciding the case at bar) approved its holding in the case at bar and pointed out the distinction which exists when no express agreement exists for allocation of the pay and no agreement can fairly be implied.

The emphasis here is on the contract between employer and employee. Such is the proper place for emphasis. The language of the Act suggests the same place of emphasis. The language is not merely "regular rate" or "regular rate which he receives." It is "regular rate *at which he is employed.*" The words "at which he is employed" point to the contractual basis of the employment.

A similar clue to the intended meaning of "regular rate" is to be found in the legislative history of the Act.

The original bill introduced in the Senate and the

Rept. 25: "The case differs from the case at bar, because there was a contract for a weekly wage, and also for an hourly 'regular rate' not less than the minimum on which overtime should be computed. We find no such written contract in the instant case, and there is no evidence in the record, nor any contention by the defendant, that the parties had agreed upon a rate of pay per hour. That there are important grounds of distinction is admitted by the court in the Belo case in the very language we have quoted."

Klotz v. Ippolito, supra, 40 F. Supp. 422, 425: "But there is an important difference between the cases [Belo]. There, the rate for the overtime is not less than one and one-half times the regular rate, and here it is less. Here, the rate per hour for overtime is the same as the rate per hour for regular time."

Fleming v. Knox, supra, 5 Wage Hour Rept. 38, 40: "It is not a case where the employer and employee, theretofore paid on a weekly or monthly basis, after the effective date of the Act get together, and in a bona fide effort to readjust the rate to the hourly basis from a monthly or weekly rate reduced the rate below what it would have been if reckoned previously by the hour, and the new hourly rate is still above the minimum guaranteed by the Act."

House on May 24, 1937, and also the substitute bill favorably reported by the Senate Committee on July 26, 1937, and passed by the Senate on July 31, 1937, and also the amended bill recommended to the House by the House Committee on August 6, 1937, and also the substitute bill later approved by the House Committee and offered as an amendment on the floor of the House on December 15, 1937, although varying in many of their provisions, were identical in the overtime provision, in language as follows:

> "* * * if the employees so employed receive additional compensation for such overtime employment at the rate of one and one-half times the regular hourly wage rate at which such employees are employed."

Likewise, all such bills were identical in the provision for reparation for violation of the above quoted overtime pay requirement, in language as follows:

> "* * * he shall be entitled to receive as reparation from his employer additional compensation for the time that he was employed in excess of such maximum work week at the rate of one and one-half times the *agreed* wage at which he was employed * * *" (emphasis ours).

Thus the reparation provision for failure to pay one and one-half times "regular rate" of pay authorized recovery of "one and one-half times the *agreed* wage at which he was employed."

Thus agreed wage was repeatedly used as the equivalent of regular wage. Thus the intention appears in recurring drafts of the Act that regular rate of pay shall be the subject of agreement between employer

and employee and that such agreed wage shall measure the prescribed overtime pay.

Indeed, the Committee reports explaining the provisions of the mentioned bills referred to the mentioned reparation provisions as authorizing recovery of one and one-half times the "regular rate of pay."

All this appears in more detail in the legislative history section of the Appendix volume.

Nothing in the Act suggests that full freedom of contract is not to be permitted the employee and employer so long as minimum standards are not violated. For instance, there is no reason under the Act why an agreement may not be made to pay an employee time and one-half for the first few hours of overtime and double time for subsequent hours, or vice versa, or to pay double time for overtime in one week and time and one-half for overtime in another week, or to give bonuses and paid vacations as a substitute for overtime pay beyond time and one-half. Wide latitude for agreement is left to employer and employee by the Act, and properly so.

No reason appears why the employee arrangements in this case are not well within the proper limits of such latitude.

This Court has spoken clearly on the point. In the Red Cap cases above mentioned, 62 S. Ct. 659, 671-672, this Court said:

> "Congress approached the problem of improving labor conditions by the establishment of a minimum wage in certain industries. It required

that workers in these industries receive a compensation at least as great as that fixed by the Act. Except for that requirement the employer was left free, in so far as the Act was concerned, to work out the compensation problem in his own way."

B.

Effect of the Contracts

Petitioner's real complaint comes down to the claim that the contracts did not have the effect of increasing the pay or reducing the hours which prevailed before the Act.

But petitioner concedes (brief, p. 37) that the parties are free to contract as to wages and rates of pay and to reduce wages and increase hours, so long as the rates agreed upon do not violate the minimum for regular time or the prescribed ratio for overtime. What substance, then, in a contention based upon failure of the contracts to increase wages or shorten hours?

C.

Petitioner's Method of Computation

Petitioner's method of computing regular rate of pay is reflected in the testimony of H. L. Sherrill, supervising inspector in the Dallas office of the Wage and Hour Division, at R. 153-179. Sherrill undertook to apply Interpretative Bulletin No. 4 (R. 394-432) to the facts of this case.

The impractical and distorted results are grotesque.

At the outset, the computator begins by putting aside the employment contract. He simply pays no attention to any agreement that the parties may have made as to hours of work and rates of pay. He treats

them as if they had made no agreement at all. He testified that he had not even looked at the employment contracts, although they were in writing and present in the office where he works. "I didn't have any knowledge of the employment contracts * * *." (R. 165-166).

Next, the computator decides for himself whether an employee works "regular hours" or "fluctuating hours," because he will use one method if the employee works regular hours and a wholly different method if the employee works fluctuating hours. If the employee's hours are fairly uniform from week to week, say 48 hours per week, he will divide the minimum guaranteed sum by 48 in every week, even though the hours in some other weeks may vary up or down from 48. If the employee works fluctuating hours he will take each week separately and will divide the guaranteed minimum sum by the number of hours worked in the particular week. Thus he took O. L. Bagwell, a night watchman (R. 198-200), and classified him as a regular hours employee because in most weeks he worked 48 hours. So to compute his regular rate of pay he divided the minimum guaranteed sum by 48 right on through every week of the employment, the same in the week of October 31, 1938, when Bagwell worked 50 hours, and in the week of July 31, 1939, when Bagwell worked 36 hours, and in the week of September 2, 1940, when Bagwell worked 12 hours. If the computator had classified Bagwell as a fluctuating hours employee he would have used 50, 36 and 12 as the respective divisors in the mentioned weeks

and would have arrived at entirely different results for those weeks.[20]

The expert computator classified Bagwell as a regular hours employee because out of the 30 weeks covered by the computation he worked only 3 weeks of irregular hours (R. 167).

Charles Prasifka, on the other hand, was classified by the computator as a fluctuating hours employee (R. 158) because out of the 32 weeks examined he worked 14 weeks of regular hours and 18 weeks of varying hours (R. 285-287).

Thus Bagwell was classified as a regular hours employee because his irregular weeks were only 10% of the whole. Prasifka was classified as a fluctuating hours employee because his irregular weeks were 56% of the whole.

No one knows where the line is to be drawn to divide regular hours employees from fluctuating hours employees. No one even pretends to know. The Act itself is wholly silent on the question. And even the Interpretative Bulletin says nothing on the subject. It says merely that as to regular hours employees one method of computation shall be used and as to fluctuating hours employees a different method shall be used. All that anyone knows is that expert computator Sherrill deemed 10% fluctuating hours too few, and 56% fluctuating hours quite sufficient, to constitute an employee a fluctuating hours employee. Computator Sherrill admitted that there was nothing but his own sense

[20] The differences in the two methods are set forth in the Interpretative Bulletin at R. 398-399.

of fitness to guide him in making this classification. He admitted that the addition of a single week of fluctuating hours might be sufficient to carry an employee over the line from a regular hours employee to a fluctuating hours employee.[21]

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[21] Thus Sherrill testified (R. 167-169):

Q. Now, the regular rate of pay as you compute it would therefore be less in that week of October 31, than it was in the week of January 9, 1939, wouldn't it?

A. Not in the case of Bagwell, for the reason that it is only three instances in the entire period of thirty weeks in which he worked hours other than forty-eight a week, and, therefore, I consider that it was regular hours per week, and I used forty-eight hours.

Q. Let us see about that. He worked twelve hours on the week of September 2, 1940, didn't he?

A. That is right.

Q. And he worked thirty-six hours in the week of July 31, 1939?

A. That is right.

Q. And he worked fifty hours in the week of October 31, 1938?

A. Yes.

Q. Now, you would not use twelve and thirty-six and fifty as your divisor, on those weeks, because in the great majority of weeks he worked forty-eight hours, you say you used forty-eight as the divisor for all of the weeks?

A. That is right.

Q. Suppose there had been four weeks instead of three weeks of varying hours, what would you have done?

A. I would still use forty-eight.

Q. Suppose there had been five weeks, what would you have done?

A. Out of thirty, I would say that five weeks would not be considered as changing it from regular hours per week.

Q. Suppose he worked six weeks—

MR. SEARLS: I pray Your Honor's judgment, isn't this getting into an argument?

THE COURT: Yes, it is rather hypothetical, I think we had better stand on what was done.

Q. Well, there is a line, isn't there, where you would change your method of computation from the straight forty-eight hour divisor shifting to a new method of computation whereby you use a different divisor in each week?

A. Yes, sir, if it was clearly a fluctuating weekly hours.

Q. Now, in your view, whether a man complies with the wage and hour Act, would depend on which side of the line he would deem the particular employment exactly to fall on.

MR. SEARLS: I pray Your Honor's judgment.

THE COURT: Overrule the objection.

A. Generally speaking, yes.

Q. Now, is there anything in the Act or in the interpretative

So petitioner's method of computation is at once plunged into uncertainty. Before the employer can know what is due to his employees he must guess, at his peril, as to which side of the line petitioner's investigator will place the employee.[22]

Indeed, if a particular week in question is the first week of the employment or in the early part of the employment the materials will not even be found at hand for a guess because, according to petitioner's theory, the employee's status as a regular hours employee or a fluctuating hours employee will depend on

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bulletin to advise an employer on which side of the line a particular employee is to fall, any method of computing the location of that line, so that an employer might determine the question?

A. Nothing in the regulations.

Q. I assume that you use your own personal judgment as to that matter?

A. It is the application of the definition of regular hours, and fluctuating hours as contained in regulation part 516.4.

Q. Now, is there any definition of fluctuating hours beyond that expression?

A. No, sir.

Q. No definition of regular hours beyond that expression, regular hours?

A. No, sir.

Q. So you read into the interpretative bulletin some definition, or some line of demarcation, and used that in the case of Bagwell, for instance, if he worked ten varying weeks you might call it fluctuating hours, whereas, if he worked only nine you might call it regular hours.

MR. SEARLS: I pray Your Honor's judgment on that.

THE COURT: The witness has indicated he is using his own judgment, I think he has the right to tell us how far he relies upon that judgment, since the law itself does not diagram this particular field, I think they are entitled to find out the limits in that particular field.

Q. Now, the line between regular hours, and fluctuating hours might be crossed by you, by there being one added week of fluctuating hours in the whole program?

A. That is possible, but not in the case of Bagwell.

Q. I am getting at your method of computation. And a man could be put in jail for not knowing just when he approached that line, couldn't he?

MR. SEARLS: I pray Your Honor's judgment on that.

[22] Indeed, the employer must guess as to what petitioner's investigator will guess on that point. If they guess differently the employer is in for trouble, whether or not the employer's guess turns out right and the investigator's wrong.

the entire course of the employment, including weeks to be worked in the future, as to which it cannot be known whether the hours will be usual or unusual or will fit into a pattern which the investigator will deem to be regular hours or another pattern which he will deem to be fluctuating hours.

Surely any interpretation of the Act which would put the employer in such an impossible position as this is to be avoided.[23]

The next step is to wrest a particular week out of the continuing employment picture and to divide the minimum guaranteed weekly sum by the number of hours worked in such week, ignoring all that has gone before such week and all that will go after such week and many other facts of the employment. Although the avowed purpose is to arrive at the *true* regular rate of pay, the computation is not affected by what the employment agreement or practice may be as to paid vacations, special bonuses, time off for illness, time off for personal matters, time off in some weeks to compensate for unusually long hours in other weeks, payment of wages in old age, nor by many other facts of the employment. Surely, this is to ignore the actualities of the employment.[24]

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[23] It is to be remembered that the Act creates a liability for money plus a penalty of equivalent sum plus attorney's fees. What of the constitutionality of an interpretation which makes the money liability, much less the criminal liability, depend on discerning such a shadowy, and, in some circumstances, actually non-existent, line as this?

[24] Thus, computator Sherrill testified (R. 169-171):

Q. Now, is your method of computation designed to arrive at the realities of the situation is that what is behind it, rather than just what the paper evidences of the situation might be, is that it?

A. I do not thoroughly understand your question.

Q. When you arrive at a regular rate of pay, is it your design

The next step is to make an arbitrary allocation of the full amount paid in the particular week to regular pay. The computator refuses to allocate any part of the amount paid to overtime pay, in spite of the agree-

to arrive, to act realistically, or to arrive at the actuality of the regular rate of pay, rather than at some bookkeeping figure?

A. No, it is the intent to arrive at the true regular rate of pay.

Q. Now, in arriving at that true regular rate of pay, do you take into consideration at all, time off that an employee has received with full pay in any prior week?

A. No, it is based upon the hours worked during the week concerned.

Q. In the single week?

A. That is right.

Q. Do you take into consideration any bonuses?

A. No, sir.

Q. Or regular vacations with full pay?

A. In figuring the amounts due, I take into consideration the time worked during the particular week involved, and if a man were off on vacation during the week, naturally he did not work during that week.

Q. Now, take Mr. Alderman, for instance, the evidence shows that he was sick eighty-three consecutive working days and received full pay throughout that period of time, and that that period was added to the usual two weeks vacation, and to isolated days of illness. Now, would you say that according to your theory that Mr. Alderman's regular rate of pay is just the same in that week as if he had been down there plugging and working those eighty-three days?

A. That is right, for the week under consideration.

Q. And that his regular rate of pay in that week is just the same as if he had been docked his pay those eighty-three days that he was sick?

A. The week would be considered independent of any other week.

Q. Now, if, following that week, that is treated independently, he was sick again, and gone another two weeks with illness, and, if, in the next following week he received a bonus as added compensation for his faithfulness and service, those facts also would not come into your computations at all in computing a regular rate of pay for the particular week in question?

A. I don't know that I really understand your question.

Q. If those things had happened after the week in question, as well as before, still they would have been ignored by you in computing this man's regular rate of pay in the week in question.

A. That is right.

Q. Is there any reason that you know of why you would not arrive at a more accurate estimate of regular rate of pay if you would take those things into consideration?

A. If he is employed on a weekly basis, why we are concerned with only that particular week involved.

ment of the parties providing for such allocation, in spite of long continued action and reliance by the parties on such agreed allocation, and in spite of the fact that the actualities of the employment are consistent with such allocation and none other.

It is admitted that if any part of the weekly salary or minimum guaranteed sum is properly allocable to overtime petitioner's whole process of computation falls down.[25]

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[25] Thus, computator Sherrill testified (R. 165-166):

Q. Let us go back to the week of January 9, 1939?

A. Yes, sir.

Q. And is $26.75, the figure you used?

A. That is right.

Q. And forty-eight hours is the hours you used?

A. That is right.

Q. You divided forty-eight into $26.75, getting, I believe you say, about fifty cents?

A. Fifty-six cents.

Q. Now, did you make any investigation to determine what part of the $26.75 was compensation for overtime and what part was compensation for the hours worked up to forty-four?

A. No, because the weeks preceding it was forty-eight hours, and the week preceding, before that, fifty hours—in other words, he was receiving every week, $26.75, regardless of the number of hours he was working, and, therefore, it was considered to be his regular rate of pay on a weekly basis for the purpose of compensation for overtime.

Q. That is to say, you used the $26.75, as if it were wholly allocated to the first forty-four hours of work of Mr. Bagwell?

A. No, sir, that was wholly allocated to the total number of hours he worked.

Q. Well, now, was any part of that $26.75 paid for overtime work above forty-four hours?

A. I didn't so consider it.

Q. Then it is correct that you treated the whole of that amount as allocated to the first forty-four hours that he worked?

A. No, sir, I treated it as being straight time for the total number of hours that he worked during the week.

Q. Did you, for instance, inquire to see whether there was an employment contract with Mr. Bagwell which specified what part of the $26.75 should be allocated to the first forty-four hours, and what part should be allocated to the work beyond the first forty-four hours?

A. I didn't have any knowledge of the employment contract, how-

The only excuse suggested for such arbitrary method of allocation is that the full weekly salary or minimum guaranteed sum is paid in an occasional or exceptional week when no overtime hours are worked.

It has already been shown that in this case such weeks of no overtime hours were principally weeks of vacation, holiday, illness, etc. See note 11, p. 16, supra.

This case does not present an instance of a person employed to work one week alone, such week to be only 40 hours and a full salary paid. Whatever assumption may be applicable to such a case is wholly unfounded when the employment, as in this case, is for continuous service at work which makes necessary week after week of overtime efforts.

The reality is that the weekly guaranteed minimum does cover overtime compensation up to the point that

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ever, based upon the fact that on the week ending October 31, he worked fifty hours and received $26.75, and the several following weeks he worked forty-eight hours and received $26.75, I naturally had to assume that $26.75 was his regular rate of pay on a weekly basis.

Q. Did you follow that same assumption right on through in all of your computations?

A. No, sir, I didn't. There are one or two exceptions, not in this particular form, but as to others.

Q. As to Bagwell, did you follow that same assumption right on through?

A. Yes, sir.

Q. Do you know now what the employment agreement may be as to allocating that $26.75, between regular time pay and pay for overtime?

A. I do not.

Q. But you do know that if any part of that sum is properly allocable to the overtime pay, that that portion is to be deducted in making the computation that you make, do you not?

A. That is right, we didn't figure overtime on overtime.

Q. And if any portion of the $26.75 is allocable to overtime pay, then the regular rate, as you compute it, would be wrong?

A. That is right, if some of it was overtime.

the overtime hours are such as to entitle the employee to more than the weekly minimum. He will receive the full guaranteed minimum in a particular exceptional week of no overtime hours, but solely because it is known and agreed that he will work many other weeks that involve the necessity of overtime service. It has already been shown that the guaranteed minimum really represents a composite week and that the composite week is a picture of all the employment facts, including the anticipated number of normal weeks, the anticipated number of unusually short weeks, the anticipated number of unusually long weeks, the anticipated vacations, the anticipated pay for times of illness, the anticipated time off for personal matters, the anticipated special bonuses, the anticipated compensating time off in some weeks for overtime in other weeks, etc. Yet petitioner attempts to discern regular rate of pay by reference to an isolated week wrested from its setting in the employment picture rather than by reference to the composite week reflected by the employment contract.

It is not surprising that a method of computation which is based upon the foregoing distortions leads to curious results.

Thus Olin Brown worked fluctuating hours under contract rate of 75¢ per hour for regular rate, at least one and one-half times such sum, $1.125 per hour; overtime rate, and minimum guaranty of $45.00 per week.

Expert computator Sherrill testified to his computations for Brown as to three particular weeks, the weeks

of April 24, 1939, October 28, 1940, and November 4, 1940 (R. 158-160, 172-175).

His computations, as contrasted with the employment contract and with what was actually paid, are shown in the following table:

Per Wage and Hour Division	10/28/40[25] 39 hours	Assumed week in 1941 48 hours	11/4/40 53½ hours	4/24/39 66 hours	Assumed week in 1939 80 hours
Regular Rate	1.154	.94	.84	.68	.5625
Overtime Rate		1.41	1.26	1.02	.8437
Total due for week	$45.00	48.88	50.61	52.36	55.12
Per Contract Between Employer and Employee					
Regular Rate	.75	.75	.75	.75	.75
Overtime Rate		1.875	1.125	1.125	1.125
Total due and paid for week	$45.00	45.00	45.23	57.94	73.50

It will be observed that Sherrill computed the regular rate in the week of 11/4/40 by dividing 53½ hours into $45.00, the agreed minimum weekly sum, instead of $45.23, which was the amount actually paid in the week. Similarly, for the week of 4/24/39 he computed the regular rate of pay by dividing 66 hours into the weekly minimum sum of $45.00, instead of $57.94, which was the amount actually paid in the week. This is upon the theory that the added 23¢ in the week of 11/4/40, and the added $12.94 in the week of 4/24/39, are overtime compensation and so are not to be considered in computing regular rate of pay. Of course, in actuality, part of the $45.00 also is overtime compensation, but nevertheless petitioner insists that the whole of the $45.00 must be treated as regular hours compensation and so is wholly included in computing regular rate of pay.

According to petitioner's computation the regular

[25] A holiday for the State Fair of Texas fell within this week.

rate and the overtime rate are different in each week of the employment. Such rates grow smaller as the hours worked grow longer. Thus, in the 53½ hour week Brown is entitled to only 84¢ per hour, as opposed to $1.154 in the 39-hour week. In the 66-hour week he is entitled to only 68¢ per hour and in the 80-hour week he would be entitled to only 56¢ per hour. The overtime rates decreased proportionately.

Hence, as computator Sherrill testified, Brown was actually overpaid $5.58 in the week of April 24, 1939 (R. 159-160, 173-174). Stranger still, as Sherrill testified, his regular rate of pay for that week was only 68¢ per hour and his overtime rate was only $1.02 per hour although he was actually paid 75¢ per hour for regular hours and $1.125 per hour for the overtime hours.

According to petitioner's computator, Brown was entitled in the 53½-hour week to only $5.61 more than in the 39-hour week, which is a rate of only 39¢ per hour for the added 14½ hours of work, of which all but one are overtime hours. Similarly, in the 66-hour week Brown was entitled to only $7.36 more than in the 39-hour week. This is at the rate of 27¢ per hour for the 27 added hours, of which all but one are overtime hours. And in the 80-hour week he would be entitled to only $10.12 more than in the 39-hour week. This is at the rate of less than 25¢ per hour for the added 41 hours, of which all but one are overtime hours. For the added 12½ hours of overtime worked in the 66-hour week over the 53½-hour week the added pay is only $1.75, which is at the rate of 14¢ per hour.

And for the added 14 overtime hours in the 80-hour week over the 66-hour week the added pay is only $2.76, which is at the rate of 19¢ per hour for the added 14 overtime hours. Thus the overtime hour rate dropped from 39¢ per hour payable for the first 13½ overtime hours to 19¢ per hour payable for the last 14 overtime hours in the same week.

The result is that an employer who employs two men at exactly the same rates of pay will pay less in the aggregate if one man works 50 hours and the other 40 hours than if both work 45 hours. These, and other anomalies, are exhibited in the testimony of expert computator Sherrill at R. 153-179.

Contrast the oddities resulting from petitioner's method of computation, as shown in the above table, with the sensible results obtained by applying the employment contract to the same weeks. Applying the employment contract, the regular rate of pay remains the same each week, as the parties actually intend that it shall, and, save for the assumed week of 48 hours, the overtime rate of pay remains the same each week, as the parties actually intend that it shall, and the employee's total compensation increases progressively in direct proportion to the added hours. The only span of hours within which the overtime rate of pay varies is the span between 40 and 53 hours.

A curious thing about petitioner's method of computation is that it produces exactly the counter-effect to petitioner's avowed purpose to spread employment by discouraging long overtime hours. Petitioner's com-

putation produces very low rates in weeks of very long hours. In the case of Brown, petitioner's computation of what is due would exactly conform to the employment contract in a week of 60 hours of work, but in all weeks of hours beyond 60 the computation would give the employee less than the wage contract would give him, and increasingly less as the hours grow longer.

But, of course, the most important objection to the method of computation is that it departs from the employment contract altogether, substitutes ex post facto determination for pre-determination of rates of pay, substitutes uncertainty for certainty, is based upon mere guess as to whether an employee is to be treated as a fluctuating hours employee or a regular hours employee, produces results which are square in the face of the intent and desire and understanding of employer and employee, and makes it impossible for employer and employee to enter into any arrangement for the payment of a uniform wage.

It is to be kept in mind that petitioner's method of computation is not offered as merely a permissible method for use when the parties have not themselves allocated the compensation between regular time and overtime hours. It is not offered merely as something to be used when there is nothing more tangible to go on. It is offered as something inexorable, as something to be applied in all situations, whatever the circumstances, and as something to override agreements of employer and employee.

All this without one word of sanction in the language of the Act.

After argument of this case in the circuit court of appeals petitioner filed a reply brief in which, for the first time, he took the position that Sherrill was mistaken in the method of computation followed by him in the trial court.

A changed method of computation was offered in such reply brief. The change was designed principally to get around the anomaly as to the 66-hour week of Olin S. Brown, where petitioner's method arrived at lesser rates of pay than actually contracted for and actually paid.

The changed method was to divide the 66 hours into the total pay afforded by the contract, which was $57.94, instead of $45.00, the "salary" or minimum guaranteed sum.

It is not stated in petitioner's brief in this Court whether he now urges the original method, as applied by Sherrill, or the new method as discovered for the first time in the reply brief in the circuit court of appeals. The inference from petitioner's brief in this Court is that petitioner has returned to the prior method, because he speaks always of the "weekly salary" as the figure to be divided by the hours worked. The inference is that petitioner now realizes that the new and changed method is affected with all the vices

of the old and actually increases the complexities and confusions of the old.[27]

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[27] The mentioned reply brief explained and applied the new method to a hypothetical case of a week of 66 hours worked under contract providing for 80¢ regular rate, not less than $1.20 for overtime rate, and $48.00 minimum guaranty.

Applying the contract rates the employee would receive $32.00 for the regular time hours plus $31.20 for the overtime hours, total $63.20.

Applying the new method computation, according to the mentioned reply brief (p. 3) the following would result:

For 53.3 hours he received	48.00
For 12.7 hours he received straight time compensation	10.14
Total straight time compensation	58.14
"Regular rate" (58.14÷66)	.88¢
For 40 hours at .88¢	35.20
For 26 hours overtime (88×1½×26)	34.32
Total compensation actually due	69.52

Analysis of such new method is contained at pages 1 to 7 of respondent's response brief filed in the circuit court of appeals in response to the mentioned reply brief of petitioner.

The beginning step in the new method computation is:

"For 53.3 hours he received $48.00"

The figure 53.3 is derived by multiplying the contract hourly rate (80¢) by 40 hours ($32.00) and then subtracting such product ($32.00) from the minimum guaranteed sum ($48.00) leaving $16.00, and then dividing $16.00 by the contract minimum overtime rate ($1.20), thus obtaining 13.3 as the number of overtime hours covered by the minimum guaranteed sum, and then adding 13.3 hours to 40 hours to obtain the total of 53.3 hours as covered by the minimum guaranteed sum of $48.00.

Thus the beginning step becomes:

For the first 40 hours he received (40×80)	$32.00
For the next 13.3 hours he received (13.3×1.20)	16.00
For 53.3 hours he received	$48.00

The second step required by the new method is:

"For 12.7 hours he received straight time compensation $10.14"

Here the computator must break down the amount paid above the minimum guaranteed sum ($15.20) into two amounts, one to be treated as "straight time compensation" and the other as "extra compensation for overtime." The figure $10.14 is obtained by multiplying 12.7 by the regular hourly rate of 80¢ specified in the employment contract, leaving $5.06 to be applied to "extra compensation for overtime."

And the new method computation becomes thus:

Actually paid—for first 40 hours, 80¢ per hour	$32.00
Actually paid—for next 13.3 hours, $1.20 per hour	16.00
Straight time compensation—for next 12.7 hours, 80¢ per hour	10.14
Total straight time compensation for 66 hours	$58.14

Regular rate (58.14÷66)=88¢

Thus the computator uses 80¢ per hour as regular rate for the first 40 hours (which is the contract rate) and then jumps up to $1.20 per hour

D.

No Policy of the Act is Frustrated by the Employment Contracts

Petitioner finds in the Act an objective to "reduce hours of labor" and to bring about "a spread of employment."

Petitioner does not state such objective in terms of absolute compulsion, but he does treat it as a sort of "brooding omnipresence" which colors the usual meaning of the words used in the Act to the point of requiring that employment agreements which conform to the pay prescriptions of the Act, both as to regular time and overtime, must, in addition, result in decreasing hours or increasing compensation, with final goal to curtail hours.

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as the regular rate for the next 13.3 hours (although the contract provides 80¢ for regular rate and the $1.20 is the overtime rate) and then drops back to 80¢ for regular rate for the next 12.7 hours.

Why use $1.20 as regular rate for the middle 13.3 hours (all overtime hours) when it is conceded that 80¢ is the correct amount for the following 12.7 hours and the preceding 40 hours?

Why allocate the $16.00 paid for the middle 13.3 hours in toto to "straight time" pay when the $15.20 actually paid for the next 12.7 hours (12.7×1.20) is so allocated only to the extent of $10.14?

How can 88¢ be the true regular rate of pay when admittedly (and as a part of the very process of computing the 88¢) 80¢ per hour was actually paid and received for the first 40 hours of work, and the same amount was actually paid and received for "straight time compensation" for the last 12.7 hours?

How can the true regular rate of pay be different from what was actually paid and received for all regular time hours? How can the true regular rate of pay be different from what was actually paid and received as "straight time compensation" for overtime hours?

How can the true regular rate of pay be one amount (80¢) for the first 40 hours and the last 12.7 overtime hours and yet be some different amount (88¢) for all hours alike?

It will be observed that if petitioner would merely substitute 80¢ for $1.20 as actually paid for "straight time compensation" for the middle 13.3 hours the end result of the computation would conform exactly to the contract rate, 80¢. The agreement of the parties would then be respected and enforced and all questions of computation would disappear into thin air.

That is to say, the petitioner merely gives lip service to the truism that payment of time and a half for overtime hours is sufficient to satisfy the Act. His actual desire is to override employment arrangements which provide such time and one-half pay if they do not require the curtailment of hours which he would like to accomplish.

He thus is victim of an over-zealous striving to achieve an objective as an absolute which was intended by Congress to be kept within restricted limits and to be attained only to the extent that employers are unable or unwilling to pay time and one-half overtime rates.[28]

The problem is accurately to appraise the intent of Congress on the subject.

It is of extreme importance that the true limits of the hours curtailment objective be found and announced by this Court.[29]

On this score, above all others, it is important that the Act be applied with precision and discrimination.

If misapplied to force curtailment of hours beyond the modest limits intended by Congress the Act pos-

[28] Much of the current criticism directed against the Act is attributable to a popular idea that the Act means to curtail work beyond forty hours, and a widespread fear that, whatever the true intent of Congress, the Act can be applied by the Administrator to force cessation of work beyond 40 hours. Such popular misconceptions are the result of "misinformation" with respect to the Act, as the President has recently stated. See also the recent Congressional debates, Cong. Rec., vol. 88, pp. 1699-1701, 1761-1773, 1785-1810.

[29] This is not the task of Congress as petitioner (brief, p. 24) suggests. It is a judicial problem and comes down finally to the point whether the intent of Congress, as ascertained by applying appropriate principles of interpretation, is such that the computation method of Interpretative Bulletin No. 4 must be read into the Act to the extent of overriding agreements which satisfy the pay requirements of the Act.

sesses potentialities of harm out of all proportion to the good that it was intended to accomplish.[30]

Much of the current misinformation about the Act is attributable to intemperate application of the Act in contested cases in court and in the vast field of administrative enforcement out of court. The growing tendency of the Administrator in this direction is indicated by the change of emphasis which has appeared in his interpretations and literature.[31]

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[30] The presently pressing need of longer hours and maximum production for fighting a total war gives point to this.

[31] A pamphlet issued by the Wage and Hour Division shortly after September 1, 1940, prior to trial of this case, for the special guidance of employers, styled "Employers' Digest of the Fair Labor Standards Act of 1938", contains opening paragraph as follows:

"PURPOSE

The Fair Labor Standards Act of 1938 (commonly known as the Wage and Hour Law) was enacted by Congress to prevent the use of the channels of interstate commerce to spread and perpetuate labor conditions detrimental to the health, efficiency, and well-being of workers and to wipe out unfair methods of competition based on such labor conditions."

A subsequent pamphlet, "The Wage and Hour Law—What it is," issued by the Wage and Hour Division after the trial of the present case, discovers the unemployment objective, not mentioned in the earlier pamphlet, in opening statement as follows:

"THE WAGE AND HOUR LAW

Low wages and excessive hours of toil mean undernourishment, unfair competition, and the draining hopelessness of unemployment. Customers without money to buy, results in goods rotting on the shelves of our merchants and industrial stagnation. It was to combat these enemies of a strong, united, and free people that the Congress of the United States passed the wage and hour law in the summer of 1938."

Administrator Andrews made this statement on September 29, 1938, before the Southern States Industrial Council at Birmingham, Alabama (3 Wage Hour Rept. 228):

"* * * Clerical forces, we all feel, are included in the Act. But I cannot see where there is going to be any practical difficulty there because your clerical force in any plant of any consequence certainly is earning on a basis of more than 25 cents an hour weekly wages divided by the hours they work. If they are well above 25

In their zeal to achieve ends which seem to them desirable, those who would adopt the extreme interpretation demand as the sole avenue of compliance what Congress intended as an alternative sometimes to be chosen in lieu of overtime pay.

Payment of overtime compensation, intended by Congress as a substitute for reducing hours, becomes at their hands a scheme to "circumvent" the Act.

Employment agreements at once take on a taint of shift or subterfuge if they do not reduce hours or increase pay which obtained prior to the Act, however certain it may be that the agreements yield the prescribed regular and overtime rates of pay.

Examples of such over-zealous application of the overtime provisions of the Act are to be found in several of the cases cited in notes 22 and 23, page 22, of petitioner's brief.

Such an example is to be found in a recent decision of a district court in Ohio, there cited, Williams v. General Mills, 39 F. Supp. 849.

In that case the employees, when the Act went into effect, were given the option of working 40 hours per week at 60¢ per hour or 56 hours per week at 52½¢

cents an hour, it seems to me that there would not be much question about time and a half for overtime, because you could figure in that weekly wage that time and a half over the 44 hours had been given consideration as remuneration for their full week's work."

Contrast such statement with the present position of petitioner.

per hour for the first 40 hours and time and one-half for the added 16 hours. They chose the latter because such arrangement resulted in $9.60 added pay per week. Although, admittedly, such choice did no violence to the social objectives of the Act, and although, admittedly, as the Court said, "very few men who have studied the problem contend that 48 hours or more of labor per week are detrimental to health," (p. 851), and although, admittedly, the pay received of 52½¢ an hour for the first 40 hours and time and one-half thereafter was in excess of the minimum standard for health and well-being expressed in the Act, such choice of longer hours was held to "circumvent the intent of Congress," (p. 582), and to be "against public policy," (p. 582), and the workers were actually condemned by the court as engaging almost in "a conspiracy between the men and the company against an Act of Congress—the men conspired to keep others out of work and the company to refrain from paying higher wages" (p. 852). This, as the court said, because "the big objective" of the Act is to "give work to more men, thus cutting down unemployment in general" (p. 851).

Can it be that Congress formulated a "public policy" to forbid work above 40 hours? Do the spread-the-work extremists not know that the Act does not purport to be an emergency measure and that its objectives are to be appraised in the light of permanent statesmanship? Do they not know what Congress was bound to know, that periods of scarcity of labor are sometimes

to be expected? Do they not know that Congress acted deliberately in withholding an absolute maximum on hours? Do they think that it was mere accident that the compulsion of the Act ceased upon payment of the prescribed ratio for overtime hours?

The legislative history of the Act discredits the extreme idea implied in petitioner's contention that Congress had some pervading objective which cannot be satisfied except by striking down the employment agreements in this case.

Such history is treated rather fully in the Appendix volume.

Congress recognized that spread of employment would take place principally in the lowest paid and unskilled employments, where the labor product in dollar value is so low that the employer cannot afford the added overtime pay. It was known that in the skilled employments, such as here involved, overtime rates would be paid in lieu of curtailing hours. Indeed it was known that in the skilled employments overtime pay, and even the precise formula of time and one-half, had already become a traditional policy.[32]

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[32] See the testimony of Isador Lubin, Commissioner of Labor Statistics of the Department of Labor, at the Hearings conducted jointly by the committees of the Senate and the House in charge of the bill:

> "Frankly, I would say that the number of workers directly affected by the minimum wage provision would not be in excess of 2,000,000. On the other hand, in regard to the hours, there it will depend entirely upon the regulations of the Board. If they permit overtime, and the pay of time and a half, as the bill provides, there is no way of telling what the employer will do. Is he going to take on new people, or let his present people work overtime or time and a half? * * * If you take the various industries and look at the number of hours that they are working, you will find that the industries that are employing the most people are working in excess of 40 now, and are for the most part paying overtime rates.

The members of Senate and House who were responsible for the legislation disclaimed any intent to work revolutionary change, except in the group of lowest paid, exploited workers, victims of sweatshop conditions, known as the submerged one-third, as to whom conditions of employment were shockingly substandard.

As to the many millions of skilled workers, already highly paid, it was considered that the Act merely gave statutory recognition to an overtime tradition which had long existed, and fixed a common starting point, 40 hours, for overtime pay to begin. As to them it was not thought that the problem of compliance was serious or that a disruptive change was being wrought.

Much less was it thought that employment agreements fairly entered into, recognizing the prescribed overtime ratio, accomplishing the desideratum of uniform pay, and permitting the continuance of happy employee relations of long standing, were being stricken down over the protest of employee and employer alike.

The Act was designed to encourage, not to unsettle, amicable employer-employee relations.

That would be true of steel, automobiles, and agricultural implements. Under this law they still would be permitted to work in excess of the minimum." (Hearings, pt. 2, pp. 338, 343.)

See Senator Black's modest statement in his letter to the New York Times of July 25, 1937 (Cong. Rec., vol. 81, p. 7746):

> "The net effect of this bill for labor as a whole will be incalculable. By shortening hours it will create new jobs in the unskilled categories for millions of our unskilled unemployed. By setting up better standards of wages in the interstate industries directly affected, it will indirectly create competition for labor which should affect wages in all industries where the labor is interchangeable between interstate and local industries." (Emphasis ours.)

The Act was designed to encourage free bargaining as to hours and rates of pay above the statutory minimums. It was a principal purpose of Congress to give legal sanction to contracts which surpass the minimum standards, whatever the form of such contracts as to methods of pay, and to protect the parties to such contracts from the unfair competition of "chiselers" whose employment arrangements were substandard; not to require the increase of pay which already exceeded the minimum standards.

What a distortion of the intent of Congress to convert the Act into an instrument for striking down contract arrangements which afford the very more-than-minimum standards which Congress purposed to encourage.

E.

The Claimed Administrative Construction

Petitioner urges Interpretative Bulletin No. 4 as if it constitutes an "administrative construction" in opposition to respondent's contention and as something which is entitled to great weight in inducing this Court to adopt a similar interpretation of the Act.

In fact, Interpretative Bulletin No. 4 is not responsive to the particular problem presented by this case. Its precise language is limited to cases where bookkeeping entries are made without basis in the understanding and agreement of the parties, and to salaries

which are not allocated by agreement of the parties between regular hours and overtime hours."[33]

Of course it would be a simple matter to make the Interpretative Bulletin conform exactly to the problem which is presented in this case. The same pen which wrote the complaint in this case could write an added paragraph into the Interpretative Bulletin, which then could be offered to this Court as possessing the dignity of an "administrative construction."

Such possibility reveals the thin nature of the claim of administrative interpretation in this case.

The inconclusiveness of Interpretative Bulletin No. 4 as applied to the facts of this case is indicated by the circumstance already mentioned that petitioner in his reply brief filed after the argument of this case in the circuit court of appeals felt it necessary to correct the computations of expert witness Sherrill in the trial court, and now, after filing of petitioner's brief in this Court, it is uncertain whether petitioner favors Sherrill's method of computation or the reply brief method.

Surely little respect, as constituting an administrative construction, is due a method of computation which is susceptible of conflicting applications requiring last minute correction and what now appears to be correction of the correction.

In any event, the method of computation urged here as an administrative construction is not of the character embraced within the rule of "great weight." It is not a determination of scope of jurisdiction such as

[33] The involved paragraphs of the Interpretative Bulletin are at R. 398-404.

must sometimes be made before the administrative agency may begin to exercise its functions. Especially, it is not a self-denying determination with reference to scope of jurisdiction, as that of the Interstate Commerce Commission in United States v. American Trucking Associations, 310 U. S. 534. Nor is it an interpretation of settled and long followed character. On the contrary, the problem here involved has been the subject of litigation since the first days of the Act, under a sort of a stand-by attitude awaiting final determination of the courts.

Here a problem becomes the subject of controversy immediately as the Act goes into effect. Such controversy is promptly brought to the courts for adjudication. The controversy relates to a subject matter as to which the Act confers no rule or regulation or interpretative authority on the Administrator. Is the court bound to rule in the Administrator's favor, or even to give great weight to the Administrator's controverted claim, merely because the Administrator issues an Interpretative Bulletin in favor of his side of the controversy?

II.

Construction to avoid serious constitutional objections.

Constitutionality of the Act has been sustained on the ground that the commerce power may be properly employed to prevent "spreading and perpetuating * * * substandard labor conditions," U. S. v. F. W. Darby Lumber Co., 312 U. S. 100, 110 (1941).

Thus, this Court in the Darby case:

> "Its purpose * * * is to exclude from interstate commerce goods produced for the commerce and to prevent their production for interstate commerce, under conditions detrimental to the maintenance of the minimum standard of living necessary for health and general well-being; and to prevent the use of interstate commerce as the means of competition in the distribution of goods so produced, and as the means of spreading and perpetuating such substandard labor conditions among the workers of the several states. * * * The motive and purpose of the present regulation is plainly to make effective the Congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the commerce and to the states from and to which the commerce flows. * * * We conclude that the prohibition of the shipment interstate of goods produced under the forbidden substandard labor conditions is within the constitutional authority of Congress. * * * As we have said the evils aimed at by the Act are the spread of substandard labor conditions through the use of the facilities of interstate commerce for competition by the goods so produced under the prescribed or better labor conditions * * * (312 U. S. 100, 109-110, 115, 122).

Thus constitutionality depends on the function of the Act to remedy substandard labor conditions, or, in the words of the Act, "labor conditions detrimental to the minimum standard of living necessary for health, efficiency, and general well-being of workers."

The conditions of employment which are challenged

in this suit are not substandard as concerns health, well-being or amounts of pay.

No one claims that a forty hour week is necessary in the interest of health, except possibly as to women and possibly as to men and women in some specially hazardous and depleting occupations. With such exceptions, it is admitted everywhere that longer hours than forty are fully consistent with health, well-being and maximum efficiency. Just where the maximum limit is may be the subject of dispute and varying opinion. For this purpose it is enough that such maximum limit is above forty hours and that Congress has not declared otherwise.[34]

To apply the Act to this case is to regulate wages and hours which surpass the average, much less the minimum necessary for well-being.

Petitioner's attack here stems from the fact that respondent paid added amounts to maintain a uniform weekly wage. Petitioner would admit that but for the minimum guaranty the employment contracts would satisfy every requirement of the Act and would not be "detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers," and would not contribute to the spread of "substandard labor conditions." Thus respondent is attacked because it paid more, not less, than a proper standard of labor conditions requires.

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[34] Section 7(b)(3) of the Act permitting 56 hours in some weeks is a recognition of this.

Concretely, respondent's claim is that Olin Brown, for instance, should have been paid $50.61 in the week of November 4, 1940, instead of the $45.23 actually paid. This dispute as to Olin Brown in such week comes down to the question whether overtime pay should have been based on 84¢ per hour, as petitioner claims, or 75¢ per hour, as respondent claims. Congress has not expressed any interest in wages within a span of 75¢ and 84¢. If it should do so its constitutional power would be seriously questioned."[35]

This Court has held in the Darby case that it is within the commerce power of Congress to fix minimum wages to the extent necessary to maintain a decent standard of living. It may be admitted, in addition, that it is within the commerce power to fix maximum hours to the extent necessary for health, efficiency and well-being. Further, it may be admitted that the congressional judgment of what minimum wage and maximum hours are necessary for the respective purposes is not to be overturned.

But the regulation here, as applied to this case, is not necessary, and is not declared by Congress to be necessary, for maintaining a decent standard of living, as to minimum wage, or for preserving health, efficiency and well-being, as to maximum hours. Thus all elements of unfair competition and spreading substandard conditions and the other social and welfare considerations which were held in the Darby case to be

[35] See The Federal Wages and Hours Act, 52 Harvard Law Review 646, 666, expressing the serious constitutional doubts that would arise if the Act were to be interpreted as applying to "wages or hours that are more than sufficient according to present Congressional criteria."

sufficient to sustain the minimum wage provisions, are removed. And if these considerations are removed are we not then outside of the appropriate field for exercise of the commerce power? What remains that is of concern to interstate commerce? And wherein lies the basis for impairing the liberty of contract?

Petitioner answers, in effect, that Congress would have the power absolutely to curtail hours at forty. And he points to West Coast Hotel Co. v. Parrish, 300 U. S. 379, and to the maximum hours cases cited by this Court with approval in the Darby case (310 U. S. 100, 125).

West Coast Hotel Co. v. Parrish involved a state statute fixing a minimum wage. It was held that the statute was sustainable as a health and welfare measure within the police power of the state. Only the due process clause of the Fourteenth Amendment was involved. No commerce power question was presented. Of the other mentioned cases, Holden v. Hardy, 169 U. S. 366, Muller v. Oregon, 208 U. S. 412, and Bunting v. Oregon, 243 U. S. 426, involved state laws fixing maximum hours for women or for men and women in specially hazardous and unhealthy occupations. There also the statutes were upheld as health measures within the police power of the state. Again, no question of commerce power was concerned. The last case, Baltimore & Ohio Ry. Co. v. Interstate Commerce Comm., 221 U. S. 612, involved a federal statute which provided maximum daily hours for railway operatives. The statute was upheld as a safety measure within

the commerce power of Congress to provide safe railway transportation.

Thus petitioner is unable to point to a single case upholding the commerce power of Congress as applied to a regulation of hours beyond the scope of what Congress has declared to be necessary for health, safety or well-being.

This Court in the Darby case upholding the validity of the wage and hour provisions under the Fifth Amendment said (312 U. S. 100, 125):

> "Both provisions are minimum wage requirements compelling the payment of a minimum standard wage with a prescribed increased wage for overtime of 'not less than one and one-half times the regular rate' at which the worker is employed."

If, therefore, the overtime provisions are to be treated from the point of view of a minimum wage regulation we are left with the same problem of where to find the congressional power for fixing wages above the amount necessary to maintain "the minimum standard of living necessary for health, efficiency and general well-being of workers." For the dispute in this case turns not on a claim that respondent has failed to pay the minimum wage but on the claim that the overtime rate of pay, admittedly one and one-half times the minimum wage or greater, must be increased to a still higher rate in violation of the employment contracts, and over the protest of the contracting parties.

The statement of Senator Borah, in the debates, is pertinent here:

> "We are not dealing here with anything except minimum wages, and those in my opinion are fixed upon one general principle and that is the amount of wages necessary to maintain a family and build up and maintain the citizenship of the country. That is all we are dealing with. * * * Mr. President, I do not say that there is not a serious constitutional question involved in this suit. I know there is. But it does not have relation to the power of fixing the minimum wage. Upon that question we have the full constitutional power to do what we have done. I would not undertake to say that some of the other questions do not raise a constitutional question. But I do say that so far as the power of the national government to fix a minimum wage for those engaged in interstate commerce, it is just as full and complete and plenary as the power of the state to fix it in intrastate commerce." (Cong. Rec., vol. 83, p. 9176.)

Also pertinent here is the testimony of then Assistant Attorney General Jackson, quoted at some length in the Appendix, given at the hearings of the joint committees, expressing the grave constitutional doubts which would arise if the Act should go beyond minimums and beyond a fair quantum meruit basis in regulating wages.

Of course on familiar principles of interpretation such doubts of construction as may exist with respect to the Act should be resolved in favor of the construction which would avoid the constitutional questions.

III.

Respondent's newspaper employees are not engaged in interstate commerce or in the production of goods for interstate commerce within the coverage of the Act.

Respondent's newspaper activities are conducted at a separate plant and with wholly separate employees from its radio activities. Hence the newspaper employees are to be treated separately from the radio employees in determining whether the Act is applicable. The injunction which petitioner seeks extends to both sets of employees alike and cannot be sustained unless the Act is applicable to both.

The point here is not whether respondent's operations may be deemed to have some *effect* on interstate commerce or whether Congress would be without constitutional power to extend the application of the Act to respondent's operations if it wished.

The point is that the Act by its terms does not apply to operations which merely *affect* interstate commerce and so does not apply to respondent's newspaper employees.

The Act applies by its terms only to those employees who actually are "engaged in commerce or in the production of goods for commerce."

In this respect the Act differs from the National Labor Relations Act, the federal anti-trust laws, the National Industrial Recovery Act and other similar legislation. The Act is similar in this respect to the Federal Trade Commission Act.

Thus the National Labor Relations Act prohibits "from engaging in any unfair labor practices *affecting* commerce." (29 USCA, Sec. 160.)

Similarly, NIRA extended to transactions "in or *affecting* interstate or foreign commerce."

Similarly, the landmark decisions on the commerce power of Congress arising under the anti-trust laws, were concerned with the question whether the challenged monopoly was such as to exercise "some direct and immediate *effect* upon interstate commerce." Hopkins v. U. S., 171 U. S. 578, 592; Swift v. U. S., 196 U. S. 375, 397; United Mine Workers v. Coronado, 259 U. S. 344, 408; United Leather Workers v. Herkert, 265 U. S. 457, 471; Industrial Assn. v. U. S., 268 U. S. 64, 77; Levering & G. Co. v. Morrin, 289 U. S. 103, 107.

The expansive coverage of the above mentioned legislation is to be contrasted with the restricted coverage of the Fair Labor Standards Act.

The distinction here was recently applied by this Court in Federal Trade Commission v. Bunte Bros., 312 U. S. 349. The Federal Trade Commission Act forbids unfair methods of competition "in commerce." It does not extend the power of the Commission to unfair trade practices which "affect" commerce. On this ground this Court held that Congress had not attempted to extend the Act to a manufacturer in Illinois who was guilty of an unfair trade practice, but who sold all his product within the state, even though Congress would have had the constitutional power to reach such a manufacturer because he competed with other man-

ufacturers who are engaged in interstate commerce. The opinion points out that such extension of the power of the Federal Trade Commission would be an "inroad upon local conditions and local standards of such far-reaching import," that it "ought to await a clearer mandate from Congress. * * *. This case presents a narrow question of what Congress did, not what it could do." (312 U. S. 349, 355.)

This same distinction was recently applied to the Fair Labor Standards Act, Jewel Tea Co. v. Williams, 118 Fed. (2d) 202, 206 (C. C. A. 10th, 1941), where the court said:

> "The act by its terms is limited to employees engaged in interstate commerce or in the production of goods for interstate commerce. It does not extend to employment that merely affects interstate commerce. If there could be doubt as to the correctness of this interpretation, it is set at rest by the legislative history of the Act."

Thus the opinion of this Court holding the Associated Press to be subject to the National Labor Relations Act, Associated Press v. National Labor Relations Board, 301 U. S. 103, 128, and the opinion of the Circuit Court of Appeals for the Fourth Circuit, holding the Baltimore Sun to be subject to the National Labor Relations Act, National Labor Relations Board v. A. S. Abell Co., 97 Fed. (2d) 951 (C. C. A. 4th, 1938), upon which petitioner chiefly relied in the Circuit Court of Appeals, do not compel a similar conclusion as to the Fair Labor Standards Act.

Of course, the publishing of a newspaper is predominantly a local operation in that the entire process is

confined within the four walls of a plant which functions like a manufacturing plant, receiving raw materials to be processed within the confines of the plant and selling the finished product at the door of the plant.

It is undisputed that only 1.7% of the finished product in this case finds its way outside of the state where the plant is located. A manufacturing operation has never been held by this court to constitute interstate commerce even when the entire output goes outside the state, much less when only a nominal part goes outside the state.

So petitioner would resort to the technique of putting respondent into the "flow of commerce." Petitioner would point to the receipt by respondent of a volume of news, features, advertising and newsprint paper from without the state and to respondent's use of the "channels of interstate communication" as creating the "stream of commerce." By this means petitioner would seek to attribute to respondent the same interstate function which was held sufficient to subject the Associated Press to the National Labor Relations Act.

But it has already been pointed out that the "flow of commerce" concept is useful only when the effort is to discern an *effect* on interstate commerce. Almost all manufacturing businesses, however local, receive raw materials from outside the state and employ telephone, telegraph and the mails. These elements, in some combinations, and as to some businesses more or less strategically situated, have been held to place a manufacturer in the flow of commerce, but only in

the National Labor Relations Board cases and only when the question is whether an interruption of the business or competition by the business can be said to *affect* interstate commerce. These elements have never been held sufficient to convert a business into one "engaged in interstate commerce."

Moreover, even if "flow of commerce" were a proper concern in this case, it is common knowledge that a wide difference exists between the function of the Associated Press in receiving and distributing news throughout the country and the function of a newspaper. The whole function of the one is "commercial intercourse." As to the other the "commercial intercourse" is merely incidental. The primary function is the manufacturing operation involved in reproducing news, editorial comment and advertising matter on paper and the selling operation involved in distributing the finished product.

This difference is pointed out by the court in the Baltimore Sun case, above mentioned, 97 F. (2d) 951, 954, where it is said that the business of the Associated Press is both to collect and distribute news, making a continuous flow of interstate communication, whereas the Baltimore Sun is merely on the receiving end, the flow of communication ceasing upon receipt of the news into the publisher's plant. Of course, in a sense, flow is resumed when the newspaper goes on the street, but the interruption has been such, and the new form of the news is so different from the old, that the conception of continuous flow becomes metaphysical. Moreover, the flow is no longer interstate unless some sub-

stantial portion of the newspapers are sold outside of the state.

The record does not show what percentage of the total content of a regular edition of The Dallas Morning News consists of news matter, features and advertising which originate from without the State. It is common knowledge, however, that such front page news and out-of-state material constitute only a small fraction of the entire content. Local news, local advertising, special stories and features written by staff employees plus Press Association reports originating from sources within the state, make up the chief content of all city newspapers. The record does show that only from 16.4% to 18.8% of the total lines of paid advertising is national advertising, that is to say, advertising of products produced outside the State and distributed within the State, and that such advertising represents only 16% to 17% of the gross advertising revenue, and that the gross advertising revenue is only half of total revenue (R. 379-380, 385-386). The evidence shows higher percentages as to the Semi-Weekly Farm News, but publication of such paper was discontinued on December 31, 1940. Since the injunction sought by petitioner looks wholly to the future, the facts as to such paper are not of consequence.

The evidence does show that approximately 70% of the Associated Press and United Press stories received into the office of the News originate from without the State, but from the whole volume of news stories so received respondent selects only a small percentage for

printing. Naturally local and in-state items are of greater interest to local readers on the whole and the percentage of out-of-state Associated Press and United Press stories actually used would be much smaller than 70% of the total news volume received through such Press Associations. The record does not show what the percentage is.

When attention is directed to what the *employees* do —whether *they* are engaged in interstate commerce, which is the statutory test—the difficulty of finding the interstate commerce only increases. The employees include reporters whose sole concern is the obtaining of local news, editors and rewrite men whose sole concern is editing local news and preparing it for the presses, paper handlers whose sole concern is with rolls of newsprint paper received at the plant after interstate transportation has ceased, electricians and mechanics whose sole concern is maintenance of machinery, elevator operators, clerks whose sole concern is handling of classified advertising originating wholly within the State or collecting accounts originating wholly within the State and numerous other employees who do not function at all in connection with the receipt of news or anything else through the channels of interstate communication.

Yet the injunction sought by petitioner is applicable to all employees alike and is not sustainable unless all are actually engaged in interstate commerce.

In spite of liberal use of the "flow of commerce"

concept to uphold federal regulation[36] no case yet has gone so far as to hold that the sale in interstate commerce of as little as 1.7% of a manufacturer's product sets up a flow of commerce or that imports of raw materials in interstate commerce for local manufacture set up a flow. Indeed, the difference between exportation of finished product and importation of raw materials is the line of distinction between the cases cited in the note and Schechter Corp. v. U. S., 295 U. S. 495, in which interstate commerce was involved only in the importation. The Schechter case has not been overruled by the later decisions cited in note 36 and is cited with approval in many of them as if to hold firm to such line of distinction.

The question remains whether the employees are engaged in the production of goods for commerce.

Somewhere a line is to be drawn between sale of a substantial volume of goods beyond state lines such as to bring the producer within the Act and shipment of such inconsequential amounts as not to bring the Act into operation. The question becomes one of degree, depending upon the consequence of the out-of-state sales.

In this case the record shows that only 1.7% of

[36] National Labor Relations Board v. Jones and Laughlin Steel Corporation, 301 U. S. 1 (1937), National Labor Relations Board v. Fruehauf Trailer Co., 301 U. S. 49 (1937), Associated Press v. National Labor Relations Board, 301 U. S. 103 (1937), National Labor Relations Board v. Friedman-Harry Marks Clothing Co., 301 U. S. 58 (1937), Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197 (1938), Santa Cruz Fruit Packing Company v. National Labor Relations Board, 303 U. S. 453 (1938), National Labor Relations Board v. Fainblatt, 306 U. S. 601 (1939), National Labor Relations Board v. Bradford Dyeing Association, 310 U. S. 318 (1940), (all dealing with National Labor Relations Act); Mulford v. Smith, 307 U. S. 38 (1939), Currin v. Wallace, 306 U. S. 1 (1939) (dealing with Agricultural Adjustment Act of 1938).

respondent's circulation goes outside of the state (R. 378). This fraction would seem to be inconsequential if not actually de minimis.

In Santa Cruz Fruit Packing Co. v. National Labor Relations Board, 303 U. S. 453, 466-467, where the interstate sales were 37%, this Court had to analyze the facts of the impact of the company's operations on interstate commerce to find that even such percentage was sufficiently substantial to have an *effect* on interstate commerce. And in the Baltimore Sun case, supra, 97 F. (2d) 951, 954-955, the court had to rely on other activities than the sale of the small percentage of the Baltimore Sun circulation beyond the state line to find an *effect* on commerce, although both the fractional volume and total volume were larger in that case than in this.

Since the statutory test is directed at the activity of the employee, not the employer, the question may narrow down as to a particular employee to this: Is John Smith, an elevator operator, engaged in the production of goods for interstate commerce merely because he facilitates the work of others who share in the production of a commodity of which 1.7% is sold outside the state? The common sense answer would seem to be "No". Indeed, it would be hard to find that his employment affects commerce, much less that it is commerce or is the production of goods for commerce.

It is true that this Court in the Darby Lumber Co. case said that the Act applies to a small manufacturer as well as a large one because the total effect of un-

fair competition of many small producers operating under substandard labor conditions may be great. But the court has not said that the principle of de minimis is not to be applied when the quantity of the product of a single manufacturer sold in interstate commerce is inconsequential in relation to the whole of such manufacturer's product.

The legislative history of the Act contains some helpful information on this score.[37]

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[37] Then Assistant Attorney General Jackson testified on the subject in the Joint Hearings before the committees of Congress (Joint Hearings, Pt. 1, pp. 81-82) as follows:

"REPRESENTATIVE CONNERY. Now, what about the newspaper business? Would the editorial staff and printers in the newspaper establishment itself—would they come under this, and how far do these go down? To the newsboys, or what?

"MR. JACKSON. If the newspaper moved in interstate commerce, the persons who were engaged in its production would come under the act.

"REPRESENTATIVE CONNERY. I am very much interested in this, because back in the A. P. case it involved that. Are you taking it from the standpoint of view of the newspaper itself, that it must go over a State line, or are you taking it by telephones and radio and that picture of them getting their news through the A. P., and all that?

"MR. JACKSON. **It would not seem to me, although I have never investigated the subject, that the fact that the newspaper got its news from an out of the State source would be sufficient to make the newspaper itself in interstate commerce.**

"REPRESENTATIVE CONNERY. How about the guild? The fellow that was in the guild?

"MR. JACKSON. The fellow that was in the guild was engaged by the Associated Press in the collection of news from all States, centralized it and sent it out. He was in the flow. But where a newspaper is getting its news in by wire, some of it, perhaps, from New York and some of it from Chicago, **I do not think that the fact that they get it by wire would be sufficient to make the newspaper itself engaged in interstate commerce.** There might be other conditions—I don't know what they are, and I don't know what their contracts are.

"REPRESENTATIVE CONNERY. Suppose the Boston Post ships up into New Hampshire. They do.

"MR. JACKSON. When it crosses the line, it is an act of interstate commerce.

"REPRESENTATIVE CONNERY. How would that affect the employees?

"MR. JACKSON. That would affect the employees just as any

IV.

Respondent is exempt from the Act as a service establishment.

No one buys a newspaper for the value of the material object. Rather, he buys it for the information that the object contains. The transaction is essentially that of providing a service to the reader.

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others would be affected by this Act.

"REPRESENTATIVE CONNERY. How about the reporters?

"MR. JACKSON. They can come under the group of professionals. It does not affect employees who are engaged in a private capacity. I don't know whether the newspapermen consider that they are engaged in a professional capacity or if they are engaged at such low wages as not to come within the bill.

"REPRESENTATIVE CONNERY. Suppose they went into a labor organization, or suppose they have a guild, all of the reporters, and suppose just for the sake of argument, that their wages are down pretty low, would they come under it then? Could you set a definite minimum wage, in other words, for your newspaper reporters. I don't mean these 'big shot' fellows, but I mean the small-town fellows.

"MR. JACKSON. It would be a matter of interpretation, and different minds might disagree on it. I would not think that the newspapermen would be included, because I would regard them as a profession.

"REPRESENTATIVE CONNERY. But you would say that those Boston Post linotype operators, the men who were engaged in actually getting out the paper, printing the paper, with the machines and all, would be in it?

"MR. JACKSON. I think they would."

And Senator Black (Cong. Rec., vol. 81, pp. 7648, Appendix 1480):

"So the bill, insofar as it relates to maximum hours of employment and minimum wages, is limited, except to the small extent I have heretofore indicated, to goods which are actually manufactured for transportation and are transported in interstate commerce. We therefore eliminate in the beginning any idea that this is an effort to regulate wages and hours in the various service establishments throughout the nation.

"That is done for two reasons. In the first place, the bill rests squarely upon the interstate commerce clause of the Constitution. In the second place, I believe it was the prevailing sentiment of the Committee, if not the unanimous sentiment of the Committee, that businesses of a purely local type which serve a particular local community, and which do not send their products into the streams of interstate commerce, can be better regulated by the laws of the communities and of the states in which the business units operate." * * *

"It [the bill] does not apply to workers in purely local services like restaurants and hotels and laundries and stores and newspapers. All these are left to the states to handle." (All emphasis ours.)

A sale is a transfer of property from one person to another for a consideration. A service is the furnishing of something useful to the recipient, where transfer of ownership may be involved, but is subordinate to the value of the service. A man who polishes an automobile transfers ownership of a certain amount of wax, but it is the polished appearance which is purchased, not the wax. A restaurant which sells food transfers ownership of the food, but, as has been held, the restaurant is a service institution because it is satisfaction or pleasing of appetite which is the real subject of the relationship with the patron. The use of telegraphic service and publication of the Federal Register are similar examples. So, the buyer of a newspaper acquires title to an object, but he pays for, and wants, and buys, the news, not the object on which the news is printed.

This distinction between service and non-service institutions is illustrated in cases arising under sales tax statutes, such as Child's Dining Hall Co. v. Swingler, 197 Atl. 105 (Md., 1938); Washington Printing and Binding Co. v. State, 73 Pac. (2d) 1326 (Wash., 1937). In the last mentioned case it was held that the printing of tariffs on order of a railroad bureau was not a sale but a service within the meaning of a sales tax act. The court held that the printer "was not selling its paper and ink to the bureau, but was furnishing its skill and labor * * *" (73 Pac. (2d) 1326, 1328).

Indeed, the question would seem to be rather free from doubt except for the fact that the Act, in ex-

pressly exempting certain newspapers of less than 3,000 circulation, would seem by inference to include other newspapers. Thus a conflict is presented between such inferential inclusion on the one hand and express exclusion of service institutions on the other hand.

It is submitted that such conflict should be resolved in favor of the exclusion. No one knows what choice Congress really intended to make as between the express exclusion and the inferential inclusion. But it is not unlikely that those who suggested the exemption in favor of small newspapers did not know whether newspapers generally would be held by the courts to be service institutions and inserted the exemption in favor of small newspapers to make doubly certain.

Especially would this choice seem proper in the light of the expressed opinions announced in the Committee hearings and on the floor of Congress as quoted at pages 81 and 82, supra.

CONCLUSION

Wherefore, respondent prays that the orders of the two courts below be in all things affirmed.

Respectfully submitted,

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